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

Citation: D. S. *v. Minister of Employment and Social Development*, 2018 SST 746

Tribunal File Number: AD-16-586

BETWEEN:

D. S.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Jennifer Cleversey-Moffitt

DATE OF DECISION: July 18, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, D. S., began receiving a Canada Pension Plan (CPP) disability pension on May 1, 2003. In her application, she stated she was unable to work because of her mental health conditions, including Post-Traumatic Stress Disorder (PTSD), depression, panic attacks, and other symptoms related to alleged workplace abuse.

[3] In August of 2006, the Appellant and her husband established a small vacation rental operation but never reported this operation to the Respondent, the Minister of Employment and Social Development. However, the Respondent did become aware of the business and on December 2, 2013, the Respondent cancelled the Appellant's CPP disability pension as of January 31, 2007, and demanded the return of an overpayment because the Respondent discovered that the Appellant had capacity to do some work. The Respondent maintained that decision on reconsideration.

[4] The Appellant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal). In a decision dated February 5, 2016, the General Division member determined that the Appellant had ceased to be disabled as of June 2007 instead of January 31, 2007. The member also found, however, that the Appellant did have capacity to work.

[5] The Appellant appealed to the Appeal Division of the Tribunal, and in a decision dated December 4, 2017, leave to appeal was granted. On appeal, she argues that the General Division committed errors of law and made findings of fact that were not supported by the evidence. I disagree. There was no error falling within the scope of s. 58(1) of the *Department of Employment and Social Development Act* (DESDA) and therefore the appeal is dismissed.

ISSUES

[6] The Appellant advanced numerous arguments. After a review of the submissions, I have determined that they can be addressed through the following main issues:

> **Issue 1: Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it when it stated that the Appellant had received employment counseling and reported difficulties sitting, standing, walking, lifting, carrying, reaching, and bending?**
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> **Issue 2: Did the General Division err in law by failing to provide adequate reasons for preferring certain medical evidence over other evidence?**
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> **Issue 3: Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction when it did not ask for Dr. Mallavarapu's clinical records or request further information from him?**
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> **Issue 4: Did the General Division err in law in its analysis of the Appellant's capacity to work?**
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> **Issue 5: Did the General Division err in law when it refused to reinstate the Appellant's CPP disability pension, but decided to reinstate her husband's CPP disability pension?**

ANALYSIS

[7] In considering the appeal, the Appeal Division has a limited mandate. There is no authority to conduct a rehearing. The Appeal Division's jurisdiction is restricted to determining whether the General Division committed an error under s. 58(1) of the DESDA.[1]

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[1] *Parchment v. Canada (Attorney General)*, 2017 FC 354.

[8] According to s. 58(1) of the DESDA, the only grounds of appeal are the following:

> a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> 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.

[9] It should be noted that the Appeal Division does not have the jurisdiction to interfere with General Division decisions on pure questions of mixed fact and law where the applicant simply disagrees with the General Division's application of settled law to the facts. While an applicant may make allegations as to how the General Division erred, these alleged errors must fall under one of the three grounds of appeal in s. 58(1) of the DESDA.[2]

[10] In order to allow the appeal, I must be satisfied that the Appellant has proven it is more likely than not that the General Division committed an error falling within the scope of s. 58(1).

Issue 1: Did the General Division base its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it when it stated that the Appellant had received employment counseling and reported difficulties sitting, standing, walking, lifting, carrying, reaching, and bending?

[11] In paragraph 12 of the General Division decision, the member writes: "In her application the Appellant reported difficulties with sitting; standing; walking; lifting; carrying; reaching; bending; remembering; concentrating; sleeping and breathing. She stated that she had received counselling through her work, and that she had ongoing visits with a psychiatrist, Dr. H. Mallavarapu." The Appellant alleges that she never communicated this in her application.

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[2] *Quadir v. Canada (Attorney General)*, 2018 FCA 21; *Garvey v. Canada (Attorney General)*, 2018 FCA 118.

[12] After a review of the file, I have determined that the General Division did not base its decision on an erroneous finding of fact with respect to the findings in paragraph 12 of the General Division decision.

[13] The Respondent's submissions were generalized with respect to all of the alleged erroneous findings of fact. Ultimately, the Respondent submitted that in line with the Federal Court's guidance, an "erroneous finding of fact" has been equated to a patently unreasonable finding that cannot be sustained based upon the evidence before the decision maker.[3] So, my task is to determine whether the finding in paragraph 12 of the General Division decision is inconsistent with the evidentiary record—in this case, was the finding made without regard for the material before the member?

[14] The Appellant submits that she believes the Tribunal "mixed up" her file with that of her husband and that is what led to the statement in paragraph 12 of the General Division decision. She submits that she never made claims about sitting, standing, walking, and so on, in her application.

[15] Upon review of the Appellant's application, I discovered that the findings recorded in paragraph 12 of the General Division decision were in fact taken from the Appellant's Questionnaire for Disability Benefits, which was signed by the Appellant on November 18, 2002. Here the Appellant described problems with sitting, standing, walking, lifting, carrying, reaching, and bending:

> Sitting/Standing – "no patience at time ½ - 1 hr."
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> Walking – "start to get shaky in the legs after walking 4 blocks"
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> Lifting/Carrying – "sometimes hurts chest and get dizzy"
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> Reaching – "sometimes hurts chest and get dizzy"
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> Bending – "sometimes get very dizzy"[4]

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[3] *Abdo v. Canada (Minister of Citizenship and Immigration),* [2007] F.C.J. No. 219 (C.A.).
[4] GD3-279.

[16] The decision was not based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it when it stated that the Appellant reported difficulties sitting, standing, walking, lifting, carrying, reaching, and bending. The statement in paragraph 12 of the General Division decision is not inconsistent with the evidentiary record. Quite the contrary, the findings in that paragraph were based on the evidence in the file before the General Division member.

Issue 2: Did the General Division err in law by failing to provide adequate reasons for preferring certain medical evidence over other evidence?

[17] The Appellant specifically argues that there was no reasonable explanation as to why the General Division member concluded that her condition had improved since 2007 and why Dr. Mallavarapu's opinions were not given the most weight. The General Division conducted a very thorough review of the evidence and provided comprehensive reasons as to why some evidence was preferred over other evidence. The General Division member concluded that the Appellant's condition had improved since 2007 and that Dr. Mallavarapu's opinions were to be considered along with those of the other consulting medical professionals. The General Division adequately discharged its duty to provide reasons that make the decision very easy to understand.

[18] Tribunal members have an obligation to ensure that reasons are adequately communicated in the decision.[5] More specifically, case law also instructs that when there is conflicting evidence, the decision-maker has a duty to address the conflicting evidence and explain how the evidence was weighed and adjudicated.[6]

[19] The Appellant argues that there was no contradictory evidence with respect to the symptoms and treatment of her psychiatric condition. The submissions suggest that I should accept Dr. Mallavaparu's opinion as the sole opinion to consider with respect to the Appellant's mental condition. The Appellant submits that any commentary on her improvement by a medical professional should be taken to only mean an improvement in the specific medical condition she was seeing that doctor to treat. The Appellant asserts that her gynecologist was only aware of

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[5] *R. v. Sheppard*, [2002] 1 SCR 869, 2002 SCC 26.
[6] *Atri v. Canada (Attorney General)*, 2007 FCA 178; *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92; *Canada (Attorney General) v. Ryall*, 2008 FCA 164.

gynecological health concerns, the oncologist was only aware of cancer-related concerns, and her family doctor was aware of all conditions except for her mental condition.

[20] The Respondent disagrees and argues that the Appellant's submissions on this point are merely a request for a reweighing of the evidence to support a different conclusion. The Respondent submits that the General Division did consider the opinion of Dr. Mallavarapu and explained why it was assigned less weight. The Respondent argues that the General Division provided reasons and that its finding falls within the range of possible outcomes that could be made based on the record.[7]

[21] In previous decisions, the courts have addressed the issue of an allegation that an administrative tribunal has failed to consider all the evidence before it. In *Simpson v. Canada (Attorney General)*,[8] it was argued that the Pension Appeals Board had ignored, attached too much weight to, misunderstood, or misinterpreted certain medical reports. In dismissing the application for judicial review, the Federal Court of Appeal held:

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact…

[22] However, it is also been established that this presumption must be balanced with the duty to provide reasons so that the decision can be understood. In *R. v. Sheppard*,[9] the Supreme Court of Canada clearly set out the purposes for providing reasons for a decision. These include permitting the parties to know the decision that was made, why that decision was made, and why some evidence was preferred over other evidence when presented with contradictory evidence upon which the outcome of the case is dependent.

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[7] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62.
[8] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[9] *R. v. Sheppard*, [2002] 1 SCR 869, 2002 SCC 26.

[23] In the case before me, the General Division member provided an extensive review of the evidence including evidence provided by Dr. Mallavarapu and provided reasons why his opinion was given less weight. The following is a synopsis of the General Division member's consideration of Dr. Mallavarapu's evidence:

a) In paragraph 11 and 12 of the General Division decision, the member noted that the Appellant could no longer work when she applied for the disability pension because of her PTSD, major depression, and psychosocial stress stemming from 17 years of workplace abuse.

b) In paragraph 14 of the General Division decision, the member considers a medical report dated March 23, 2003, where Dr. Mallavarapu states that the Appellant had prolonged major depression, panic disorder, and severe marked psychosocial stress. He further states that the underlying reasons for her depression and panic attacks have made it impossible for her to work on a regular basis and that it is impossible to predict how long her symptoms will last.

c) In paragraph 15 of the General Division decision, the member considered Dr. Mallavarapu's opinion that her "severe depression and panic disorder were not conditions that generally resolve quickly" and "may require years of supportive psychotherapy and/or medication".

d) In paragraph 22 of the General Division decision, the member cited the March 29, 2007, report where Dr. Mallavarapu reported that the Appellant was feeling nervous, anxious, worried, and depressed.

e) In paragraph 32 of the General Division decision, the member considered Dr. Mallavarapu's opinion that the Appellant's condition had plateaued and that she was unlikely to be able to return to the workforce in the foreseeable future.

f) In paragraph 48 of the General Division decision, the member considered the Appellant's oral evidence that she continued to see Dr. Mallavarapu and that her medications included Epival and Celexa.

g) In paragraph 58 of the General Division decision, the member noted that Dr. Mallavarapu's report from March 29, 2007, stated, that the Appellant continued to be nervous, anxious, worried, and depressed.

[24] It is clear from the General Division's examination of the record that Dr. Mallavarapu's opinions and reports were thorough. However, there was evidence in the file that suggested the Appellant's symptoms had improved and the General Division fulfilled its duty by examining all of the evidence in the file and explaining why Dr. Mallavarapu's opinions were given less weight. In paragraph 62 of the General Division decision, the member writes:

> The Appellant submitted that Dr. Mallavarapu's specialist opinion must be given significant weight. The Tribunal notes that his reports after March 29, 2007, do not state the evidence upon which he based his conclusion that the Appellant's condition had not improved and that she was unable to work. Given that Dr. Mallavarapu sees the Appellant only a few times a year for short appointments and appears not to be in contact with her family doctor about her condition, it seems unlikely that there is a strong factual basis for the opinions he expressed in 2013 and 2014. Although his diagnosis may not have changed, any assessment by him of the severity of the Appellant's symptoms or of her capacity to work after March 2007 is of little value, particularly if it conflicts with other evidence.

[25] It is clear from the General Division decision that the member included Dr. Forgie's opinions—which were contradictory to Dr. Mallavarapu's—in the analysis as well. In paragraph 60 of the decision, the member writes:

> The Appellant stated that she kept her medical issues separate from each doctor. However, she is claiming that her mental health regularly prevents her from participating in the workforce and that it has done so for many years. In order to do that, her symptoms must have a regular and significant impact on her level of function. It is not plausible that symptoms of that magnitude would not be an ongoing concern or at least worthy of note by the Appellant's family doctor. Instead, while Dr. Forgie was aware of the Appellant's mental health issues and even provided a referral to Dr. Mallavarapu, she did not question the Appellant about her status and did not communicate with Dr. Mallavarapu or anyone else about the Appellant's treatment or her condition. Dr. Forgie's only mention of the Appellant's psychological condition was that it was stable in 2007-2008 and that by 2013 it was not a current issue.

[26] The Federal Court of Appeal concluded in *Canada (Minister of Human Resources Development) v. Quesnelle*[10] that by failing to explain why it rejected the considerable body of apparently credible evidence indicating that the respondent's disability was not "severe," the Pension Appeals Board had failed to discharge the duty of providing adequate reasons for its decision. Without some analysis of the contradictory medical evidence, this purpose for giving written reasons is not achieved.[11]

[27] In the present case, one doctor indicated that the Appellant's psychological condition was stable in 2007–2008 and not an issue by 2013, while another doctor found she was still experiencing symptoms as of 2013. As the trier of fact, the General Division considers which evidence is most credible and reliable. The General Division member considered the evidence, weighed it, and explained why certain evidence was given more weight than others. The General Division adequately discharged its duty to provide reasons.

Issue 3: Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction when it did not ask for Dr. Mallavarapu's clinical records or request further information from him?

[28] The Appellant is responsible for providing evidence to support her arguments and, if she thought there was relevant information missing, then it was up to her to file those documents, raise the issue, and/or ask for an adjournment. It is not the responsibility of the Tribunal to request further information from a doctor to assist the Appellant in proving her case. The General Division did not fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction when it did not ask for Dr. Mallavarapu's clinical records or request further information from him.

[29] If the Appellant wanted to submit additional evidence from Dr. Mallavarapu, it was her responsibility to do so. The General Division has no duty to request further information or advance the claimant's case on her behalf.[12]

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[10] *Canada (Minister of Human Resources Development) v. Quesnelle*, 2003 FCA 92.
[11] *Atri v. Canada (Attorney General*), 2007 FCA 178, at para. 10; *Canada (Attorney General) v. Ryall*, 2008 FCA 164.
[12] *Glover v. Canada (Attorney General)*, 2017 FC 363, at para. 18.

[30] If there was additional information that merited submission, the Appellant had opportunities to attempt to get/submit this information. It is not the Tribunal's duty to reach out to every doctor to ask for additional information. The General Division did not commit an error in this respect.

Issue 4: Did the General Division err in law in its analysis of the Appellant's capacity to work?

[31] This issue arises from the establishment of a small vacation rental operation by the Appellant and her husband. Under the business names X or X (the Inn), the Appellant and her husband opened one rental suite in 2006, a second in 2007, and a third in 2008. The General Division conducted an extensive review of the evidence and applied the correct legal test with respect to the Inn's operation. The General Division did not commit an error in law in its analysis of the Appellant's capacity to work.

[32] The Appellant submits that her involvement in the business was minimal, the business was not lucrative, and she was greatly assisted by family and friends. She submits that these three factors are indicative that she did not have capacity to work.

[33] The Respondent submits that the General Division's consideration of the Appellant's involvement in the Inn's operations was within the correct context—the General Division member considered whether "even if the business was not successful, the Appellant's level of activity is an indication that she regularly had the capacity to pursue substantially gainful employment."[13]

[34] The CPP provides that an applicant is disabled if their condition renders them incapable regularly of pursuing any substantially gainful occupation. As the Court noted in *Klabouch v. Canada (Social Development)*,[14] it is an applicant's capacity to work and not the diagnosis of his or her disease that determines the issue of severity under the CPP. The measure of whether a disability is "severe" is not whether the claimant suffers from severe impairments, but whether

[13] General Division decision, at para. 66.
[14] *Klabouch v. Canada (Social Development)*, 2008 FCA 33.

his or her disability "prevent[s] him or her from earning a living […] In the context of the CPP, the yardstick is employability." [15]

[35] In the present case, the General Division member was entitled to take into account the Appellant's work activities with respect to the Inn. In doing so, as required by the statutory definition of a severe disability, the member's analysis focused on evidence of the Appellant's function and capacity to work, rather than on her diagnosis. Particular emphasis on this point can be found in paragraph 74 of the General Division decision, which reads:

> In this case, the Appellant's remuneration consisted of income from self-employment which was off-set by greater losses. The income was generated by the rental of overnight accommodation. That may have affected profitability, but lack of profit does not necessarily mean that the Appellant lacked capacity to pursue substantially gainful employment. There is no suggestion that business was slow or expenses were greater because of anything related to the Appellant's health. Bookings were not turned down because of it. Web-site reviews do not suggest that service was inadequate and in fact indicate the opposite. The Appellant was performing duties that would normally have been done by paid staff, and the business had no employees. There is no reliable evidence that she performed her duties poorly, that she required help, or that she was unable to do them regularly or as required. The business spent no money paying others to do that work. Had the Appellant performed it elsewhere, she would likely have received an hourly wage that would have been adequate compensation for her efforts. The fact that she happened to be working in a business that was not as prosperous as had been hoped, or one that recorded a net loss which she then claimed on her income tax, does not mean that she did not have the capacity to perform substantially gainful work.

[36] The General Division decision also noted that there was contradictory evidence in the file with respect to the Appellant's time spent working for the Inn. In paragraph 68, the General Division member examines the contradictory evidence and concludes that "[w]hatever the reason, the Tribunal finds that her evidence as to the number of hours that were required and that were actually worked by her or by anyone else is unreliable simply because it is impossible for the Tribunal to determine which if any version is accurate." In paragraph 70 of the General Division decision, the member concludes: "Considering all of the available evidence other than

[15] *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, 2000 SCC 28, at paras. 28 and 29.

the Appellant's own statements, which are unreliable, a logical conclusion is that the Appellant was doing most of the work involved in the operation of the inn until 2012 at the earliest, and the Tribunal so finds."

[37] While the Appellant disputes the General Division's assessment of the evidence with respect to her residual capacity to work, she is essentially attempting to persuade me to reassess the evidence and come to a different conclusion. This is beyond my role on this appeal. As the Federal Court held in *Tracey v. Canada (Attorney General)*,[16] it is not the Appeal Division's role to reassess the evidence or reweigh the factors considered by the General Division. Mere disagreement with the decision is not a ground of appeal.[17]

Issue 5: Did the General Division err in law when it refused to reinstate the Appellant's CPP disability pension, but decided to reinstate her husband's CPP disability pension?

[38] After a review of the file and a reading of the Appellant's husband's decision[18] to reinstate his disability pension, it is evident that the facts are very different. Although leave to appeal was granted on this issue, a deeper examination of the alleged error in law reveals that it is clear that although the facts are not the same, the legal tests are consistently applied.

[39] The Appellant's husband initially began receiving a CPP disability pension in January of 2004. The Respondent found that the Appellant's husband demonstrated capacity to work and the pension ceased in April of 2007. The Respondent denied the request for reinstatement. In a decision dated March 30, 2016, the General Division allowed the appeal and the Appellant's husband's CPP disability pension was reinstated as of April 2007.

[40] In my leave to appeal decision, I noted that consistency of approach by the Tribunal is essential. The Federal Court of Appeal quite clearly articulated this point in *Canada (Attorney General) v. Bri-Chem Supply Ltd.*:[19]

> [40] The starting point for tribunals is that while they should try to follow their earlier decisions, they are not bound by them: IWA v. Consolidated

[16] *Tracey v. Canada (Attorney General)*, 2015 FC 1300.
[17] *Griffin v. Canada (Attorney General)*, 2016 FC 874.
[18] *L.S. v. Minister of Employment and Social Development* (March 30, 2016), GP-14-3825 (SST).
[19] *Canada (Attorney General) v. Bri-Chem Supply Ltd.*, 2016 FCA 257.

> Bathurst Packaging Ltd., 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282 at pages 327-28 and 333; Tremblay v. Quebec (Commission des affairs sociales), 1992 CanLII 1135 (SCC), [1992] 1 S.C.R. 952 at pages 974; Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles), 1993 CanLII 106 (SCC), [1993] 2 S.C.R. 756 at pages 798-799. Further, within limits, it is possible for one tribunal panel to disagree with another and still act reasonably: Wilson v. Atomic Energy of Canada, 2016 SCC 29 (CanLII), 399 D.L.R. (4th) 193.
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> [41] However, that is only the starting point. Other principles come to bear. To name one, a tribunal is constrained by any rulings and guidance given by courts that govern the facts and issues in the case: Canada (Attorney General) v. Canadian Human Rights Commission, 2013 FCA 75 (CanLII), 444 NR 120 at paras. 18-19.
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> [42] Another principle is that, in a case like this, Parliament—with a view to furthering efficient and sound management over an area of administration—has passed a law empowering a tribunal to decide certain issues efficiently and once and for all. Certainty, predictability and finality matter. Allowing tribunal panels to disagree with each other without any limitation tears against the need for a good measure of certainty, predictability and finality.
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> [43] In some contexts, certainty, predictability and finality arguably matter even more. Here, for example, we are dealing with commercial importation and international trade, an area where the CBSA, customs brokers and others are deluged every day by millions of goods seeking quick, efficient and predictable entry to our domestic market: see the Tribunal decision at para. 37, quoted in para. 13, above.
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> [44] Therefore, while it is true that later tribunal panels are not bound by the decisions of earlier tribunal panels, it is equally true that later panels should not depart from the decisions of earlier panels unless there is good reason.

[41] The Appellant submits that the facts are identical. The Respondent submits that the fact scenarios are very different and that the General Division's role is to assess each individual's file using a consistent approach, understanding that each individual has a unique fact situation.

[42] The Appellant's submissions focus primarily on the tasks involved in operating the business. What is lacking from the Appellant's submissions is an explanation as to how there was an error in law in the General Division decision. There is no explanation as to how the General Division erred in its assessment of capacity to work with respect to the allegation that the General Division's decision was inconsistent with the decision in her husband's file.

[43] The Appellant's husband reports that he has depression, arthritis of his spine, and a traumatic brain injury.[20] His alleged disability is completely different than his wife's alleged disability.

[44] Additionally, the husband provided evidence that he was severely disabled and, with respect to his involvement in the Inn, he "relied heavily upon his spouse, daughter and father-in-law."[21] The Appellant submits that although she relied on her family's assistance, she argues that the Inn required very little work on her part.

[45] The alleged disabilities are completely different, the functional capability of each person is different, and the nature of their involvement in the business was different.

[46] Each individual was assessed with respect to their specific disability and capacity to work. The fact scenarios were not the same, but the application of the law was and it yielded two different outcomes because each person's file was independently adjudicated. The General Division decision clearly applied the correct legal tests and determined that the Appellant had capacity to work. There was no error in law.

CONCLUSION

[47] The appeal is dismissed.

Jennifer Cleversey-Moffitt
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
REPRESENTATIVES:	Gayle Myers, Wiebe Douvelos Wittmann LLP, Representative for the Appellant Jean-Francois Cham, Representative for the Respondent

[20] General Division decision GP-14-3825, at para. 8.
[21] General Division decision GP-14-3825, at para. 11.