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

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Citation: *R. M. v Minister of Employment and Social Development*, 2019 SST 1681

Tribunal File Number: GP-18-802

BETWEEN:

R. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Interlocutory Decision

July 24, 2019

BACKGROUND

[1] The Claimant made his application for a disability benefit on March 21, 2012. His MQP is December 31, 2013. The Social Security Tribunal (SST) General Division (GD) dismissed his application in January 2016 (at an in-person hearing). The Tribunal Member found "very little objective evidence" of disability as of the MQP. The Claimant appealed.

[2] The SST Appeal Division (AD) granted leave[1] and allowed the appeal[2] on March 23, 2018. The AD referred the case back to the GD for a *de novo* hearing pursuant to the provisions of the Department of Employment and Social Development Act (DESDA). In its ruling the AD stated:

> "To avoid any apprehension of bias, it is appropriate, in this case, that the matter be referred back to the General Division for a *de novo* hearing before a different member."

[3] *A de novo* in-person hearing convened on October 15, 2018. Mr. Yormak appeared for the Claimant. The Minister did not appear. A discussion took place regarding the appropriateness of this GD member conducting a *de novo* hearing. Counsel Yormak requested that I recuse myself after having candidly acknowledged that in preparation for the hearing I accessed and reviewed 53 different documents. These included:

- the original file and decision of the GD,
- an audio recording[3] of the previous hearing,
- two decisions from the AD on the issues to be decided at the hearing, and
- arguments of the parties at the AD

[4] The Claimant's lawyer argues that there is a fundamental injustice in this approach to a hearing *de novo* and contrary to the notion of procedural fairness. He alleged that there is the appearance of an apprehension of bias. Mr. Yormak submitted that the record before the *de novo* Member should constitute no more and no less than the record, that was before the previous GD Member prior to that appeal proceeding.[4]

[5] Further, Mr. Yormak asserts that the Member having reviewed the entire previous proceeding had more than likely formed a clear opinion if not a conclusion. He recited my response that I had an "open mind" with regard to the eventual outcome of the appeal. With his last comment, I agree. I indicated to Mr. Yormak that I was open to allow additional evidence

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[1] As found in tribunal file GP-18-802: IDEC February 28, 2017
[2] ODEC March 23, 2018

[4] The argument of Mr. Yormak can be found in the file at page IS9-3

including further testimony if that was his wish. The matter was adjourned for written submissions on the issue of recusal.

A REFERRAL BACK FROM THE AD TO A MEMBER OF THE GD

[6] Social Security Tribunal appeal cases may be referred back from the Appeal Division (AD) to the General Division (GD) for reconsideration of the original decision. The authority for this is Section 59 of the Department of Employment and Social Development Act (DESDA).[5] The AD can provide directions. In this case, it ordered that the hearing before the new GD Member be *de novo.*

[7] This form of hearing is not expressly set out in section 59 of the DESDA. There was no direction in this case as to what the "record" consists of for reconsidering the case. Typically a SST appeal record will generally include:

- the parties' documents and submissions
- any request made pursuant to the *Social Security Tribunal Regulations* (e.g. extension of time, adjournment, added party)
- any interlocutory orders
- the hearing recording
- the decision(s)

[8] I have had access to these documents (and recording) as well as the decision of the AD. I am satisfied that the use of this background information (including the use of the recording of evidence of the hearing) has been of benefit in understanding the background, undisputed facts and medical opinions. By not utilizing this record, there would be a waste of time and resources. This principal is supported by the courts.[6]

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[5] Section 59 (1) of the *Department of Employment and Social Development Act* (DESDA) states that the Appeal Division may dismiss the appeal, give the decision that the General Division should have given. It can refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division completely or in part.

[6] the use of the transcript (and arguably recording of the hearing) of a previous hearing is supported by in *Re: X* 2005 Carswell Nat 6321

[9] Counsel for the Claimant argues that a *de novo* hearing is not possible in view of all of the pre-disclosure to a Member. He argues that a Member must be insulated from most of the information contained in the file before a true *de novo* hearing can be held. A decision is required as to whether or not the hearing can proceed before such a Member of the GD. I am satisfied that it can.

ANALYSIS

[10] I find that a *de novo* hearing is a form of hearing that is permitted by the DESDA. Section 59 of the DESDA empowers the AD with authority to direct the GD, when read in parallel with the jurisprudence, to conduct a *de novo* hearing.

[11] Mr. Yormak refers me to the Supreme Court of Canada which had this to say[7]:

> "Procedural fairness is an essential aspect of any hearing before a Tribunal. The damage created by apprehension of bias cannot be remedied."

[12] He provided insight as to how "de novo" has been variously defined as follows:

- Duhaime's Law Dictionary- "Anew, over again. *De novo* is used to refer to a trial which starts over, which wipes the slate clean and begins all over again, as if any previous partial or complete hearing had not occurred."
- West's Encyclopedia of Law Edition 2. Copyright 2008- de novo- [Latin, Anew.]" A second time: afresh. A trial or a hearing that is ordered by an appellate court that has reviewed the record of a hearing in a lower court and sent the matter back to the original court for a new trial, as if it had not been previously heard nor decided"

[13] On these points, Mr. Yormak presents no evidence as to what "damage" has been created by my having read the record and documents referred to above; or, evidence of the "apprehension" to justify me from being precluded from deciding the case. The fact that the Tribunal considered the matter before is not in and of itself grounds for disqualification.[8]

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[7] (Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), 11992] 1 SCR 623.
[8] This position is supported in the case of Janssen-Ortho Inc. v. Apotex, 2011 FCA 58

[14] I am supported in this view by a non-binding decision of this tribunal where my colleague, Anne S. Clark decided,[9] "If there are no directions otherwise, testimony and evidence submitted for the previous appeal can be considered in a proceeding to reconsider a matter the Appeal Division referred to the General Division." The legislation does not specify whether the GD is required to rehear all of the evidence from the parties or whether a decision can be based, entirely or in part, on evidence already adduced at the first hearing.

[15] The Tribunal is to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit[10]. It is much more efficient to decide issues based on a thorough review of the evidence previously adduced than to have all parties resubmit evidence and repeat all oral testimony. All parties received a copy of the hearing recording prior to the hearing. There were no issues taken with this at the AD where the appellant had the opportunity to raise any questions or objection. Counsel will have the discretion to present further evidence or clarify the evidence previously adduced, if necessary.

[16] The appellant's affirmed testimony from the first hearing is part of the record[11]. However, the appellant will be given the opportunity to adduce evidence including further testimony. I am satisfied that the recording forms part of the record in this appeal. The parties knew the hearing was being recorded, the recording was made available to the Appeal Division, and neither party objected. The Appeal Division could have directed that the recording be removed from the record and did not. The AD did not identify any issues of natural justice or procedural fairness that may justify the recording being removed.

[17] The Courts have held that *de novo* hearings which incorporate previous evidence are permitted because there is a presumption of integrity and impartiality on the part of the decision-maker.[12] The fact that a member of the GD considered the matter before is not in and of itself grounds for disqualification.[13] The Courts have taken the position that on a trial de novo, a judge is not precluded from reaching the same conclusion but must not be irrevocably committed to a

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[9] R.D. v Minister of Employment and Social Development, 2018 SST 860 (CanLII), <http://canlii.ca/t/hwcgf>
[10] Section 3 Social Security Tribunal Regulations
[11] The use of the transcript (and arguably recording of the hearing) of a previous hearing is permitted *Re X* 2005 Carswell Nat 6321 as cited by Member, Clarke
[12] *Gale v. Canada* 2004 FCA 13
[13] *Janssen-Ortho Inc. v. Apotex*, 2011 FCA 58

particular conclusion for the same reasons given by a different judge in advance of conducting the *de novo* hearing. This is such a case.

[18] When a matter is referred back for a *de novo* hearing, it does not mean that a second Member may not include in the record any documents tendered in connection with the first hearing. This includes the first Member's adverse decision. Counsel will have every opportunity to cite and review those parts of the GD decision with which he disagrees and I can make a fresh decision in the context of all of the evidence that will be before me at the end of the hearing. Based on all of the evidence, I can conduct the second hearing with an open mind. I will review all of the evidence (some of which may have been based on incomplete information) and any further evidence the appellant wishes to present.[14]

[19] This procedure is confirmed in a prior decision in the AD.[15] In that case, the appellant requested that the Tribunal listen to the recording of the prior General Division hearing, read the prior General Division decision and held a further hearing to clarify or add to the evidence that had already been presented. The case concluded that a redetermination of an appeal, unless there are issues of natural justice, bias, or procedural fairness, can proceed on this basis.

[20] In the end, I do not believe that the mere reading of a previous decision (or listening to the recording of that hearing) which is adverse to the Appellant could lead to a reasonable apprehension of bias or preclude a final decision incorporating both the previous and new evidence, should any be presented. This is the position taken before in the AD of the tribunal and I subscribe to this persuasive view.

CONCLUSION

[21] The application to have this Member recuse himself from hearing this appeal is dismissed. A date will be set for an in-person hearing.

John Eberhard

[14] *Lahai v. Canada*, 2002 FCA 119
[15] *A.M. and Minister of Employment and Social Development*,2017 SSTGDIS 98

Member, General Division – Income Security Section