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

Citation: *M. G. v Minister of Employment and Social Development*, 2019 SST 830

Tribunal File Number: AD-19-458

BETWEEN:

M. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: September 5, 2019

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] This matter has a long and complicated history. The Applicant, M. G., has held a variety of jobs, most notably as a youth corrections officer. In April 2013, she applied for a Canada Pension Plan (CPP) disability pension, claiming that she could no longer work because of post-traumatic stress disorder (PTSD), depression, and anxiety.

[3] The Respondent, the Minister of Employment and Social Development (Minister), refused the application. The Applicant appealed that refusal to the General Division of the Social Security Tribunal. It agreed with the Minister that the Applicant was not disabled within the meaning of the *Canada Pension Plan*.

[4] The Applicant took her case to the Tribunal's Appeal Division. It found that the General Division had acted unfairly by deciding the Applicant's appeal without offering her an opportunity to address evidence in the hearing that the Minister had selectively redacted. The Appeal Division ordered the General Division to rehear the matter.

[5] Before that could happen, the Applicant applied to the Federal Court for judicial review of the Appeal Division's decision, arguing that the Appeal Division should have simply granted her a disability pension rather than sending the matter back to the General Division for a new hearing.

[6] In its submissions to the Federal Court, the Minister reversed its position and conceded that the Applicant was disabled as of January 2012. The Federal Court dismissed the application, and the General Division resumed its proceeding, with the Applicant now claiming that she had

lacked the capacity to form or express an intention to apply for the CPP disability pension[1] from October 2003 to April 2013.

[7] The General Division held a hearing by videoconference and, in a decision dated April 5, 2019, dismissed the Applicant's appeal. The General Division agreed that the Applicant had had difficulty accepting and understanding her limitations, but it found that her lack of insight into her condition did not mean she was unable to form or express an intention to make an application for benefits. The General Division noted that, during the relevant period, the Applicant was able to participate in work and other activities that required significant levels of comprehension and communication. She was also able to attend, and provide instructions for, medical treatment.

[8] On June 28, 2019, the Applicant applied for leave to appeal from the Appeal Division. In her accompanying submissions, she summarized the proceedings to that point and expressed her lack of faith in the appeals process, criticizing the conduct of the Minister and the General Division member who presided over her first hearing in 2016. She also levelled several broad allegations against the second member General Division to hear her claim, specifically:

- It ignored evidence that favoured her claim;
- It assessed evidence out of context; and
- It selectively relied on evidence that supported a preferred outcome.

[9] In an effort to address certain preliminary issues, the Appeal Division scheduled a pre-hearing teleconference. In response, the Applicant indicated that she preferred to discuss such matters by way of an exchange of written questions and answers. Accordingly, on August 9, 2019, the Appeal Division wrote to the Applicant and asked her to confirm that she wanted to proceed with an appeal and, if so, to list what she regarded as her most significant reasons for appealing.

[10] On August 23, 2019, the Applicant responded with a lengthy letter describing numerous instances that, in her view, indicated bias on the part of the General Division, specifically:

[1] The standard for incapacity, as set out in section 60(8) of the *Canada Pension Plan.*

- It ignored her evidence that she did not understand the nature of her psychological illness and that she therefore could not form or express an intention to seek help for it;
- It engaged in victim blaming by drawing an adverse inference from her refusal to listen to Dr. Lunney's advice;
- It imposed on her a higher standard of proof than what the law demands, ignoring the requirement that it needed to be only "50 percent plus a feather";
- It disregarded her submissions on the meaning of capacity as defined by Ontario's *Substitute Decisions Act* (SDA);
- It ignored the dissociation element of PTSD, which she took pains to emphasize during the hearing;
- It agreed with the Minister's position, despite the fact that its representative was late for the hearing and was not familiar with the case file; and
- It ignored evidence that her jobs during the relevant period were inconsequential and that some of her income was actually financial support, given to her by her father, which she incorrectly reported as income.

[11] Having reviewed the General Division's decision against the underlying record, I have concluded that the Applicant has not advanced any grounds that would have a reasonable chance of success on appeal.

ISSUES

[12] According to section 58 of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material.

[13] An appeal may be brought only if the Appeal Division grants leave to appeal,[2] but the Appeal Division must first be satisfied that it has a reasonable chance of success.[3] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[4]

[14] I must determine whether the Applicant has raised an arguable case on the following questions:

Issue 1: Did the General Division ignore or misconstrue evidence about the Applicant's incapacity claim?

Issue 2: Did the General Division display bias when it heard the Applicant's case?

ANALYSIS

Issue 1: Did the General Division ignore or misconstrue evidence about the Applicant's incapacity claim?

[15] I do not see an arguable case for this proposed ground of appeal.

[16] The Applicant suggests that the General Division dismissed her appeal despite medical evidence indicating that she was incapable, according to the definition set out in section 60(8) of the *Canada Pension Plan*, of forming or expressing an intention to make an application before April 2013.

[17] As the General Division noted in its decision, the test for incapacity is precise and focused. It is also strict. The fact that the Applicant has already been found disabled under the *Canada Pension Plan* does not necessarily mean that she was also incapable of forming or expressing an intention to apply for benefits. My review of its decision indicates that the General Division meaningfully analyzed the evidence and came to the defensible conclusion that, more likely than not, the Applicant was capable of forming or expressing an intention to make an application during the 10 years leading up to the point when she actually did so.

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[2] DESDA, ss 56(1) and 58(3).
[3] *Ibid*., s 58(1).
[4] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[18] As trier of fact, the General Division is entitled to a degree of deference in how it chooses to weigh the evidence. My review of its decision indicates that General Division gave due consideration to the available evidence on file, as well as the Applicant's testimony. The General Division placed particular weight on the fact that the Applicant was able to work in a series of jobs during the relevant period and had applied for various government benefits such as Employment Insurance, the Disability Tax Credit, and Ontario Disability Support. The General Division also noted that the Applicant had sought medical care and had written and published a book as part of her therapy.

[19] Contrary to the Applicant's allegation, the General Division also addressed Dr. Lunney's evidence—not only her reports and office notes, but also her testimony. In a March 2013 certificate of incapability, Dr. Lunney stated that the Applicant had a good general knowledge of what was happening with her money. In a June 2014 report, Dr. Lunney wrote that the Applicant had previously had difficulty understanding that she had a diagnosable and treatable condition—a point that the psychoanalyst repeated and elaborated on at the hearing. The General Division gave due consideration to this evidence but concluded that the Applicant's reluctance to accept her limitations was not equivalent to an incapacity to form or express an intention to apply for CPP disability benefits. The General Division noted that, in any event, the Applicant had at least some awareness of her mental health problems, as indicated by her 20 years of regular psychotherapy.

[20] While the General Division did not arrive at the conclusion the Applicant would have preferred, it is not my role, as a member of the Appeal Division, to reassess the evidence but to determine whether the decision is defensible on the facts and the law. An appeal to the Appeal Division is not an opportunity for an applicant to re-argue their case and ask for a different outcome. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of section 58(1) of the DESDA and whether any of them have a reasonable chance of success.

Issue 2: Did the General Division display bias when it heard the Applicant's case?

[21] The threshold for a finding of bias is high, and the onus of establishing bias lies with the party alleging its existence. The Supreme Court of Canada[5] has stated that test for bias is: "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?" A real likelihood of bias must be demonstrated, with a mere suspicion not being enough. Bias denotes a state of mind that is in some way predisposed to a particular result that is closed with regard to particular issues.

[22] The Applicant disagrees with the General Division's finding that she was capable of forming or expressing an intention to apply for benefits earlier than April 2013, but an unfavourable outcome is not, by itself, evidence of impartiality. The Applicant sees bias in what she alleges are repeated errors by the General Division, but errors are not necessarily evidence of a closed mind and, in any case, I see do not see any indication that the General Division did, in fact, commit an error:

- There is no arguable case that the General Division ignored the Applicant's evidence that lack of insight into her psychological illness impaired her capacity to apply for benefits. As noted above, the record shows that the General Division considered this submission but rejected it, having reviewed the available evidence. Above all, the General Division found that, while the Applicant may not have appreciated the extent of her limitations, that lack of perspective did not prevent her from seeking psychological counselling or applying for other government benefits during the relevant period.
- There is no arguable case that the General Division "blamed" the Applicant for failing to follow Dr. Lunney's advice. Dr. Lunney testified that the Applicant did not initially understand the state of her dysfunction, and I see that the General Division considered and rejected this evidence as a possible explanation for the Applicant's delay in applying for CPP disability benefits. However, I do not agree that the General Division, in assessing competing strands of evidence, was in any way

[5] *Committee for Justice and Liberty v Canada (National Energy Board)* 1976 2 (SCC), 1978 1 SCR.

blaming, or passing judgment on, the Applicant, other than to find, having applied facts to law, that she did not meet the stringent statutory standard for incapacity.

- There is no arguable case that the General Division imposed on the Applicant a higher standard of proof than what the law requires. In paragraph 5 and 27 of its decision, the General Division correctly stated that the Applicant was required to show that, "more likely than not," she lacked the capacity to form or express an intention to apply for benefits. Accurately citing the law does not, by itself, settle the matter, but I also reviewed the decision as a whole and saw no indication that the General Division held the Applicant to an inappropriately high standard.
- There is no arguable case that the General Division disregarded the Applicant's claim of incapacity under the provisions of the SDA. The General Division briefly referred to this submission in its decision,[6] but it apparently gave it little or no weight. In my view, the General Division was entitled to do so, not least because the SDA is provincial legislation whose definition of incapacity differs significantly from that of the *Canada Pension Plan*. To put it another way, the SDA is irrelevant in the present context.
- There is no arguable case that the General Division ignored aspects of the Applicant's PTSD. A trier of fact is presumed to have considered all the evidence before it[7] but, in any event, the General Division repeatedly referred to the Applicant's PTSD diagnosis in its decision.[8] The Applicant alleges that the General Division ignored the "dissociation element" of the disorder but, judging by its decision, it clearly understood that the Applicant and her therapist were attempting to establish a link between her delayed CPP disability application and symptoms associated with her PTSD.
- There is no arguable case that the General Division exhibited favouritism toward the Minister's representative. The Applicant objects to the General Division's declaration that it agreed with the Minister's representative.[9] This, however, was not an indicator

[6] General Division decision, para 12.
[7] *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[8] General Division decision, paras 4, 10, 21, and 23.
[9] General Division decision, para 19.

of bias but merely a succinct introduction to the General Division's detailed reasons for finding that the Applicant had not met the legal threshold. I have listened to the entirety of the audio recording of the hearing and heard nothing to substantiate the Applicant's allegation that the General Division systematically favoured the Minister's representative.[10] If the representative was late or unprepared for the hearing, as the Applicant alleges, it was not apparent in the recording. To my ears, the presiding member did not make special allowances for the Minister's representative and extended comparable levels of courtesy and consideration to both parties.

- There is no arguable case that the General Division ignored evidence that the Applicant's more recent jobs were inconsequential and that some of her income was actually financial support from her father. The Applicant was given an opportunity to qualify and contextualize her earnings during the relevant period. The recording of the hearing indicates that she took advantage of that opportunity and attempted to explain that her later earnings were not quite what they seemed.[11] The General Division presumably took those explanations into account when it found that the Applicant was not incapacitated. I see no reason to interfere with the decision where the General Division, by all appearances, made a good-faith attempt to grapple with the evidence available to it.

CONCLUSION

[23] Because the Applicant has not identified any grounds of appeal under section 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.

Member, Appeal Division

REPRESENTATIVE:	M. G., self-represented

[10] The recording was at times inaudible. The General Division member and Minister's representative could be heard, but the Applicant's voice was often muffled, possibly due to poor placement of the recorder.
[11] Recording of the General Division hearing, part one, at approximately 1:40.