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

Citation: *R. M. v Minister of Employment and Social Development*, 2020 SST 743

Tribunal File Number: AD-19-902

BETWEEN:

R. M.

Appellant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: August 28, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] This case is about what it means for the Appeal Division to return a matter to the General Division for a "*de novo*" hearing.

[3] The Claimant is a former sales manager who applied for Canada Pension Plan disability benefits in March 2012. The Minister refused his application, and in January 2016, the General Division of the Social Security Tribunal (SST or Tribunal) dismissed his appeal, finding insufficient evidence that he was disabled from work.

[4] The Claimant appealed this dismissal to the Tribunal's Appeal Division. In March 2018, the Appeal Division decided that the General Division committed an error when it found the Claimant not disabled. The Appeal Division referred the matter back to the General Division for a "*de novo* hearing before a different member."[1]

[5] In October 2018, another member of the General Division convened an in-person hearing. At the outset of the hearing, Stephen Yormak, the Claimant's legal representative registered an objection when it became clear that the presiding member had reviewed certain items related to the previous General Division proceeding. Those items included the parties' written arguments, the recording of the hearing, and the first General Division member's written reasons for her decision. Mr. Yormak argued that the Appeal Division's directive to hold a *de novo* hearing meant that the second General Division member was restricted to no more and no less than the record available to the first General Division member. He asked the second General

[1] Appeal Division decision dated March 18, 2018.

Division member to recuse himself from the appeal, alleging that his continued participation would raise a reasonable apprehension of bias.

[6] The General Division member adjourned the hearing to give the parties an opportunity to make written submissions on the Claimant's application for recusal. In an interlocutory (interim) decision dated July 24, 2019, the member dismissed the Claimant's application to recuse himself from the case because he was satisfied that the Claimant's right to procedural fairness would not be compromised by his use of what he called "background information."

[7] On July 26, 2019, Mr. Yormak emailed the Tribunal requesting that the General Division's interim decision "be immediately referred to the Appeal Division." It appears that the Tribunal's staff did not regard this request as a valid application for leave to appeal to the Appeal Division and, over the next eight months, they exchanged numerous phone calls and emails with Mr. Yormak in an apparent effort to get him to "complete" the Claimant's appeal.

[8] On April 3, 2020, after the 90-day deadline prescribed by law to request leave to appeal a General Division`s decision had passed, Mr. Yormak wrote to the Tribunal to confirm that the Claimant was appealing the presiding General Division member's interlocutory decision not to recuse himself from the proceedings.

[9] In a decision dated May 8, 2020, I exercised my discretion to grant the Claimant an extension of time in which to file a leave to appeal application. At the same time, I granted the Claimant leave to appeal because I thought that he had raised an arguable case.

ISSUES

[10] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division (i) did not follow procedural fairness; (ii) made an error of jurisdiction; (iii) made an error of law; or (iv) based its decision on an important factual error.[2]

[11] I have to decide the following questions:

[2] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

Issue 1: Did the presiding General Division member err when it determined that a *de novo* hearing allows it to consider all the material on the record?

Issue 2: Did the member's refusal to recuse himself from the appeal create a reasonable apprehension of bias?

ANALYSIS

[12] An appeal to the Appeal Division can have several possible outcomes. The Appeal Division may dismiss the appeal, confirm, rescind or vary the decision of the General Division in whole or in part, give the decision that the General Division should have given, or refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate.[3]

[13] In this case, the Appeal Division referred the matter back to the General Division for reconsideration with directions. Use of the word "directions" rather than alternatives such as "suggestions" or "guidance" indicates that the General Division has no choice but to follow the Appeal Division's word to the best of its ability.

[14] In my decision dated March 29, 2018, I found that the General Division based its decision on an erroneous finding that the Claimant had been less than diligent in pursuing back surgery. I concluded by ordering the following remedy: "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."[4]

[15] I have to decide if the General Division arrived at the correct meaning of *de novo*. Depending on the outcome, I will then have to decide if the General Division's familiarity with the complete record gives rise to a reasonable apprehension of bias.

[3] Section 59(1) of the DESDA.
[4] Appeal Division decision dated March 29, 2018, paragraph 29.

Issue 1: Did General Division err when it determined that a *de novo* hearing allowed it to consider all the material on the record?

[16] What does *de novo* mean? The phrase is Latin for "new" or "fresh," and it is commonly used in Canadian legal discourse. However, it is not immediately obvious what a *de novo* hearing should look like at the SST.

[17] I want to clarify one thing at the outset. In its submissions, the Minister repeatedly downplayed the significance of the phrase *de novo*, suggesting that the General Division was free either to ignore it or interpret it as it saw fit:

> It was open for the Member to review the material as there was no direction indicating that any of the material should be omitted.[5]
>
> The Appeal Division did not make a direction about whether the documents on file including the audio of the previous General Division should be available to the new member.[6]
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> Since no specific directions were given other than a new member be assigned to hear the appeal, it was open to the General Division to review the materials and audio from the previous hearing.[7]
>
> When the Appeal Division referred the matter back to the General Division for a new hearing it exercised it authority to give directions, and directed that the matter be returned to a different Member to avoid an apprehension of bias. No other directions were made by the Appeal Division.[8]

[18] In my view, the Appeal Division's order to hold a *de novo* hearing was just as important as its order to have a different General Division member hear it. Like it or not, the Appeal Division used a particular phrase that has particular meaning. It could have used alternative language and ordered a "reconsideration" or a "new" hearing. It did not do so. Instead, it used the phrase *de novo,* bringing with it a body of jurisprudence about what those words mean.

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[5] Minister's submissions, paragraph 1.
[6] Minister's submissions, paragraph 14.
[7] Minister's submissions, paragraph 15.
[8] Minister's submissions, paragraph 31.

De Novo in Law Dictionaries

[19] Mr. Yormak would prefer the Appeal Division to adopt the definitions found in law dictionaries. Black's Law Dictionary defines a "trial *de novo*" as a new trial on the entire case—that is, on both questions of fact and issues of law—conducted as if there had been no trial in the first.[9] In its interlocutory decision, the General Division referred to two other law dictionary definitions that Mr. Yormak had brought to its attention:

> 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.[10]
>
> 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.[11]

[20] For Mr. Yormak, the implication is clear: a judge or adjudicator who presides over a hearing *de novo* might be eminently impartial, but they should nonetheless take steps to insulate themselves from material yielded by previous hearings. That material, I presume, would include transcripts, orders, decisions, or any other material that was produced with the involvement, in whole or in part, of a prior judge or adjudicator.

[21] These law dictionary definitions of *de novo* are what I would describe as strict. They seemingly offer no room for a wide-ranging survey of the entire record, such as the one that the General Division undertook in this case. Of course, as a member of the Appeal Division, I am not bound by law dictionary definitions, however compelling they appear to be on their surface. I am obliged to follow case law and precedent. I also have to look at the purpose of this Tribunal and the context in which it operates.

De Novo at the Social Security Tribunal

[22] Both the General Division and the Minister cited, with approval, a previous General Division decision that discussed what it means when the Appeal Division returns a matter for

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[9] *Black's Law Dictionary* (10th Edition 2014), page 4692.
[10] *Duhaime's Law Dictionary.*
[11] *West's Encyclopedia of Law.*

reconsideration. In *R.D. v Canada*, as in this case, the Appeal Division found error in a General Division decision and ordered a *de novo* hearing. The General Division member who presided over the second hearing noted that the applicable legislation does not specify what evidence can be heard on reconsideration. It added, "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."[12]

[23] The General Division was clearly influenced by *R.D.*, even as it acknowledged that it was not bound by another General Division decision. I do not find *R.D.* to be as compelling. As in this case, the General Division decided that "*de novo*" was essentially a synonym for "new" and interpreted it in a way that gave it scope to rely, among other items, on the recording of the prior General Division hearing. However, while the member in *R.D.* understood that the Appeal Division's direction was subject to interpretation, it did not specifically address the formal meaning of *de novo*.

[24] In its interlocutory decision, the General Division also referred to another non-binding Tribunal decision, this one from the Appeal Division. In *A.M. v Canada*,[13] the Appeal Division held that, on reconsideration, a second General Division member can consider any documents tendered in connection with the first hearing, unless there are issues of natural justice, bias, or procedural fairness. However, there is a crucial difference between that case and this one. In *A.M.*, the Appeal Division, having found an error in the General Division's first decision, simply sent the matter back for "redetermination" by a different member, with no mention of a *de novo* hearing. The absence of that phrase, I would argue, gave the General Division in that instance a green light to consider the record as it saw fit.

De Novo at Other Administrative Tribunals

[25] Both the General Division and the Minister relied on *Re X*, a decision of the Immigration and Refugee Board (IRB) Refugee Protection Division that considered what it means to hold a *de novo* hearing.[14] Citing a series of Federal Court Trial Division cases, the presiding member

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[12] *R.D. v Canada (Minister of Employment and Social Development)*, 2018 SST 860.
[13] *A.M. v Canada (Minister of Employment and Social Development)*, 2017 SSTGDIS 98.
[14] *Re X*, 2005 CanLII 56882 (CA IRB).

wrote, “It is settled case law that, unless the first decision was set aside due to a breach of the rules of fairness or natural justice, the use of the transcript of a previous hearing at a subsequent hearing is permitted.”

[26] In arguing for a “clean slate” General Division hearing, Mr. Yormak urged caution in looking to the practices of other administrative tribunals for guidance. It was quite possible, said Mr. Yormak, for the Tribunal to use the words *de novo* in a way that is completely different from another tribunal. On this point, I agree. The SST is governed by its own set of rules and follows procedures and norms that may not be shared by other adjudicative bodies.

[27] However, Mr. Yormak went further, arguing that court decisions reviewing the practices of other boards and tribunals have nothing relevant to say about *de novo* hearings at the SST. For instance, he dismissed Federal Court of Appeal decisions about the IRB, alleging that it operates according to a distinct, even unique, process in which decisions routinely go back and forth between divisions, building a common record as they proceed. By way of illustration, he referred me to a case called *Thanabalasingham*,[15] in which the Federal Court of Appeal was asked whether detention reviews by the Immigration Division were *de novo* hearings under the *Immigration and Refugee Protection Act.* On this narrow question, the Court wrote;

> It was important to clarify the term *de novo*. Strictly speaking, it is a hearing at which an entirely fresh record is developed and no regard is had to any prior decision. That is not what takes place at a detention review. Indeed, in the *Canada (Minister of Citizenship and Immigration) v. Lai*, Campbell J. held that all existing factors must be taken into account, including the reasons for previous detention orders.

[28] If Mr. Yormak intended this case to show that the IRB and the SST are not comparable, he did not succeed. *Thanabalasingham* is about one very specific function, among many, that the IRB performs as part of its mandate. Detention reviews are unique to the IRB and can’t be analogized to anything that the SST does, but the IRB performs other functions that can. Like the SST, the IRB is a two-tier tribunal that houses trial and appeal divisions, with the latter having the power to remit a matter back to the former for a rehearing. In that context, the SST can and

[15] *Canada v Thanabalasingham*, 2003 FC 1225 (CanLII), [2004] 3 F.C.R. 523.

should take guidance from the Federal Court and Federal Court of Appeal in how it addresses *de novo* hearings at the IRB.

De Novo at the Federal Court and Federal Court of Appeal

[29] Neither the Federal Court nor the Federal Court of Appeal have ever considered what it means to hold a *de novo* hearing at the SST or, more particularly, what documents, if any, should be excluded from the record when the Appeal Division orders the General Division to reconsider a matter. However, both Courts have addressed similar issues in the context of the Canadian immigration and refugee determination regime.

[30] In *Darabos v Canada*,[16] the applicants claimed protection as Convention refugees, alleging their lives were at risk due to membership in a particular social group. The IRB rejected their claim in part because of a recording from a previous hearing, in which they were found to have given vague and inconsistent testimony about the extent of their persecution in Hungary. The Federal Court held that the use of transcripts from previous hearings are generally admissible before a newly constituted Board. The Court also said that "the use of transcripts of prior hearings to make adverse credibility findings does not violate principles of fairness where the claimants are provided … with an opportunity to be heard and make representations."

[31] The Federal Court came to a similar conclusion in *Khalof v Canada*,[17] where the issue was whether the IRB's Convention Refugee Determination Division (CRDD) breached the rules of natural justice by admitting into evidence the transcript of the applicant's testimony from a previous hearing at the same tribunal. The Court concluded that the CRDD did not make a reviewable error by relying on the transcript, but only because it did not use it to call the applicant's credibility into question. If the CRDD had used the transcript without giving the applicant an opportunity to respond, then that, in the Court's view, would have amounted to a breach of natural justice.

[32] In *Diamanama v Canada*,[18] the applicant and the respondent consented to an order overturning a decision of the IRB but could not agree on the wording of the order. The applicant

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[16] *Darabos v Canada (Minister of Citizenship and Immigration)* 2008 FC 484.
[17] *Khalof v Canada (Minister of Citizenship and Immigration)* 2000 CanLII 15172 (FC).
[18] *Diamanama v Canada (Minister of Citizenship and Immigration)* [1996] F.C.J. N0 121 (Q.L.), (F.C.T.D.).

wanted the order to allow the panel rehearing the claim access to the transcript of the first hearing. The respondent wanted the order to simply return the matter to a differently constituted panel for rehearing. In the end, the Federal Court saw no reason to impose restrictions on the second panel:

> What is in issue, in this case, is the evaluation of factual evidence in which the credibility of the applicant is an integral component. I would not be prepared to require that a decision maker (in this case the second panel) has to accept a credibility finding made by another decision maker ... The second panel must be free to conduct the hearing as it sees fit and to make its decision by reference to the evidence adduced before it. The second panel can, of course, use the transcript of the first hearing for whatever purposes it wishes but no order, from me, conditioning that use is either required or appropriate.

[33] More recently, in *Cheema v Canada*,[19] the Federal Court confirmed that, in principle, it is acceptable for a panel in a *de novo* hearing to use the transcript from the original hearing for whatever purpose it chooses, such as testing the veracity of a claimant's story. In *Cheema*, however, the Court invoked an exception to this general rule—one that came into play if the first hearing was marred by one or more instances of procedural unfairness. The Court thus allowed a motion remove an IRB member who had reviewed a transcript of the original hearing because it contained testimony from a co-claimant who was (i) denied legal counsel and (ii) not invited to the second hearing to explain his previous testimony.

[34] The Courts' tolerance for prior material goes beyond transcripts. One of the cases cited by *Re X* was a Federal Court of Appeal decision called *Lahai*.[20] In that case, the IRB's CRDD had been ordered to hold a *de novo* hearing after an earlier panel was found to have denied the claimant's right to be heard. The Federal Court of Appeal directly addressed whether a board member could read material from previous proceedings before hearing a refugee claim *de novo.* The Court determined that he could:

> Accordingly, the Appellant was entitled to a *de novo* hearing of his claim from Mr. Khan [the second board member] and it would be a breach of the duty of fairness if Mr. Khan did not approach the matter with a view to determining the Appellant's refugee claim *de novo* on

[19] *Cheema v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1082.
[20] *Lahai v Canada*, 2002 FCA 119.

> the basis of the oral and documentary evidence adduced before him in connection with the Appellant's claim. This does not mean that, in the interest of efficiency, a second panel may not include in the record documents tendered in connection with the first hearing, including the personal information form completed by the claimant.

[35] The Court was certainly aware of the "clean slate" definition for *de novo,* but it decided that the term nevertheless permitted a second adjudicator to review, not just "documents tendered in connection with the first hearing," but also previous adverse decisions:

> Whether a reasonable person would think that it was likely that Mr. Khan had not afforded him the *de novo* hearing to which he was entitled by the duty of fairness depends on an assessment of the totality of the evidence. One item alone, such as the second panel's reading of the first panel's decision, will normally not be dispositive of the question of whether the claimant was denied the right to procedural fairness.

Notwithstanding law dictionary definitions, the Court found that, in principle, a *de novo* hearing was possible even if the tribunal member assigned to the second hearing had reviewed transcripts and decisions related to the first.

[36] In short, the Federal Court and Federal Court of Appeal allow members wide discretion to consider material from previous hearings. Exceptions may occur if (i) transcripts or recordings are being used to establish a witness's credibility without giving that witness a further opportunity to be heard or (ii) the first decision was set aside due to a breach of the rules of procedural fairness or natural justice.

The SST requires a flexible and practical approach to reconsideration

[37] As we have seen, the Federal Court and the Federal Court of Appeal have adopted a flexible and practical approach to reconsideration. Above all, they have made it clear that any reconsideration—whether *de novo* or not—depends on statutory language, as well as on contextual factors and policy considerations, including principles of fairness and natural justice.

[38] I find it useful to look at the nature and purpose of the SST. It is a high-volume administrative tribunal tasked with adjudicating claims for federal government benefits "as

informally and quickly as the circumstances and the considerations of natural justice permit."[21] This mandate suggests that, while fairness must guide the Tribunal, so too must efficiency. The SST is also bicameral, with a General Division and Appeal Division, each with distinct, though complementary roles. The General Division hears evidence and makes factual findings, and the Appeal Division identifies and remedies the General Division's errors. In keeping with the imperative for efficiency, the Appeal Division does not itself hear evidence or otherwise re-do the General Division hearing; instead it performs something like a classically appellate function, one that sees it frequently sending matters back to the "trier of fact" for reconsideration. When the Appeal Division applies this remedy, it is explicitly telling the General Division that it has found an error that must be corrected.

[39] However, it is difficult, if not impossible, to correct an error without knowing anything about that error. Mr. Yormak has adopted an absolutist view of what a *de novo* hearing must look like, going as far as to argue that even the Appeal Division decision—the one that found an error, ordered reconsideration, and gave directions—should be excluded from the record made available to the second General Division member. In my view, such an extreme approach, if adopted, would lead to an absurd result, with the second member blindly conducting a hearing without any understanding of what made it necessary in the first place. In such a scenario, there would be a real risk of the second member unknowingly replicating the errors of the first.

[40] In *Sitsabeshan v Canada*,[22] the Federal Court agreed that procedural efficiency is a valid consideration when a second member is deciding whether to review the record that was available to the first:

> [C]ounsel advised me that some panels of the CRDD have been reluctant in a hearing de novo to do anything else that to in fact start "de novo" ignoring all of the evidence previously before the earlier panel. That strikes me as a significant waste of resources. While, as in this case, the evidence before the earlier panel may not be fully satisfactory, it should be possible to overcome the weaknesses in the earlier evidence by supplementing that evidence. It should not be necessary to revert to the beginning.

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[21] *Social Security Tribunal Regulations*, section 3(1)(a).
[22] *Sitsabeshan v Canada (Secretary of State)*, 1994 CarswellNat 241.

Mr. Yormak fears that the second member's mind would inevitably be tainted by the first member's possibly erroneous approach to the evidence and the law. I can't agree. It is worth noting that even the dictionary definitions of *de novo* suggest that a second hearing should be conducted *as if* the first had never occurred. The words "as if" speak more to cultivating an open mind than to performing specific actions, such as removing documents or recusing members. Tribunal members are trained to be impartial, and it is reasonable to assume that they are capable of setting aside, or looking beyond, information that is potentially prejudicial to a party.

[41] For these reasons, I conclude that, in the context of the SST, a reconsideration—even one directed to be a *de novo* hearing—permits the second General Division member wide discretion to review materials that were available to, or generated by, the first member.

Issue 2: Did the presiding member's refusal to recuse himself from the appeal created a reasonable apprehension of bias?

[42] I have found that the second General Division member did not err when he found that a *de novo* hearing permitted him to consider all the material, including the recording of the hearing, that was available to the first General Division member.

[43] The next question for me is whether the member's intention to continue presiding over the Claimant's appeal nevertheless raises a reasonable apprehension of bias. Mr. Yormak maintains that, having reviewed the entire record of the previous proceeding, the second General Division member likely formed a clear opinion, if not a conclusion, about the Claimant's disability.

[44] In his interlocutory decision, the member insisted that, despite having read the prior General Division decision and listened to the recording of the prior General Division hearing, he was able to bring an open mind to the reconsideration hearing. He added:

> 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.

After careful consideration of the parties' submissions, I have concluded that, despite his familiarity with the prior proceeding, the second General Division member's continued involvement in this file does not raise a reasonable apprehension of bias. As the General Division noted, tribunals and individual adjudicators are presumed to be impartial. Of course, that presumption is rebuttable, but none of the Claimant's submissions has, in my view, succeeded in rebutting it.

[45] Bias suggests a state of mind that is in some way predisposed to a particular result. The threshold for a finding of bias is high, and the burden of proof lies with the party alleging that it exists. The Supreme Court of Canada 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. Whether there is bias depends on the particular facts and circumstances of the case,[23] Relevant considerations include, among others, the nature of the inquiry, the rules under which the tribunal is acting, and the subject-matter that is being dealt with.

[46] In this case, the General Division had good reason to review the complete record of the prior General Division hearing. That hearing, the Appeal Division found, was marred by an error in how the General Division considered medical evidence, which in turn influenced how it assessed the Claimant's credibility. It was reasonable for the second General Division member, in an effort to avoid repeating the first General Division member's mistake, to go beyond simply reading the Appeal Division's decision and fully review the underlying record. The second member cannot be blamed for refusing to recuse himself (which would have further delayed a proceeding that is now more than eight years old) because he wanted to understand more fully where his predecessor had gone wrong.

[47] I am reassured when I look at the member's actions to date. He has never attempted to conceal his interest in finding out what happened in the first hearing, going as far as to request information from the parties in an apparent effort to clarify the error that was identified by the Appeal Division.[24] He disclosed to the parties that he had reviewed the complete record and heard submissions on the issue after Mr. Yormak demanded his recusal. He offered considered

[23] *Committee for Justice and Liberty v Canada (National Energy Board)* 1976 2 (SCC), 1978 1 SCR.
[24] Letter from General Division dated May 17, 2018, IS3.

reasons explaining why his continued participation in the proceeding would not raise a reasonable apprehension of bias.

[48] Above all, the member indicated in his interlocutory decision that he intended to give the Claimant an opportunity to submit more documentary evidence and give further testimony to supplement what was already on the record. He pledged to review all of it with an open mind and make a fresh decision about the Claimant's disability. Members of administrative tribunals such as the General Division are not infallible, and they inevitably bring their own attitudes, approaches, and outlooks to the decision-making process, but they are also trained to assess evidence as fairly and objectively as possible. I see nothing to rebut the presumption of impartiality in this case.

[49] In *Janssen-Ortho Inc. v Apotex Inc.*,[25] the Federal Court of Appeal addressed the issue of reasonable apprehension of bias where a case was returned to the same tribunal member who had heard it previously: "Something much more fundamental must be present to justify a recusal. Indeed, we find it hard to believe that judges or tribunals would declare themselves biased simply because they are being asked to reconsider or re-determine a matter."

[50] The Court reached a similar conclusion in *Gale v Canada*:[26]

> We agree with the respondent that, in the circumstances of this case, the matter should be remitted to the same Adjudicator. At paragraph 12:6320 of Donald J.M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback, 2003), the learned authors state:
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> > When the tribunal reconsiders a matter either on its own motion or following judicial review it must, of course, comply with the duty of fairness. ... And unless a court orders otherwise, while the same persons who decided the matter on the first occasion may normally also rehear it, they should not do so where they were earlier disqualified for bias, or if for any reason, there is a reasonable apprehension that the original decision-maker is not likely to determine the matter objectively.

[25] *Janssen-Ortho Inc. v Apotex Inc.* 2011 FCA 58.
[26] *Gale v Canada (Solicitor General)*, 2004 FCA 13.

> There is no suggestion here of bias. Nor is there any reasonable apprehension of bias. The decision-maker in this case was the Vice-Chairman of the Public Service Staff Relations Board. There is a presumption of integrity and impartiality in such a decision-maker and in the absence of some evidence to the contrary, we can see no reason why the matter may not be re-determined by him.

[51] The above cases featured allegations of bias that arguably raised greater "apprehension" than the Claimant's. Both *Janssen-Ortho* and *Gale* involved tribunal members that saw matters returned to them after a superior body had found errors in their original decisions. In both cases, members were ordered to rehear cases that they had already adjudicated—a higher order of familiarity with the prior proceeding and its outcome than what we see in this case with the second General Division member.

[52] As Mr. Yormak correctly notes, justice must not only be done, it must be seen to be done. The Claimant believes the second General Division member's mind is tainted against him. The Minister believes that the member is capable of deciding the Claimant's case even-handedly. However, what the parties believe is irrelevant. What matters is whether a reasonable and informed person would apprehend bias. The key word here is "reasonable."

[53] I do not see the Claimant's apprehension of bias as reasonable. His insistence that he won't be able to get a fair hearing unless his file is reassigned to another member implies that a judge or adjudicator cannot bring an open mind to a reconsideration hearing if they have read the decision from the first hearing. This goes against the presumption that courts and tribunals are unbiased. This presumption is so important that the Supreme Court of Canada has imposed a high standard of proof on a party alleging bias in judicial or quasi-judicial proceedings. In this case, the Claimant has not met it.

CONCLUSION

[54] For the reasons discussed above, I have concluded that the presiding General Division member did not err when he decided not to recuse himself from this matter simply because he had read the entire record. The most relevant case law, read in the context of the SST's nature and purpose, suggests that, absent specific direction otherwise, a General Division member has wide latitude to consider material that was generated in prior hearings.

[55] A *de novo* hearing does not mean documents from the first hearing must be removed on reconsideration, and it does not mean a member must recuse himself if they are not. Rather, it means a member must bring an open mind to the new proceeding and allow the parties an opportunity to present their full case. I have found no indication that the member in this case has approached the Claimant's file with anything less than an open mind.

[56] This appeal is therefore dismissed. This Claimant's appeal will proceed under the same General Division member.

Member, Appeal Division

HEARING DATE:	July 15, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. M., the Appellant Steven Yormak, representative for the Appellant Susan Johnstone, representative for the Respondent