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

Citation: *MC v Minister of Employment and Social Development*, 2021 SST 278

Tribunal File Number: AD-21-138

BETWEEN:

M. C.

Applicant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: June 14, 2021

Canada

DECISION AND REASONS

DECISION

[1] I am refusing the Claimant leave (permission) to appeal.

OVERVIEW

[2] The Claimant is a 57-year-old former nanny and housekeeper. She was last employed in June 2018.

[3] Later that year, she applied for a Canada Pension Plan (CPP) disability pension. She claimed that she could no longer work because of chronic back pain and depression. The Minister refused the application because, in its view, the Claimant had not shown that she had a severe and prolonged disability.

[4] The Claimant appealed the Minister's refusal to the Social Security Tribunal's General Division. The General Division held a hearing by videoconference and dismissed the appeal.[1] The General Division looked at the medical evidence and decided that the Claimant's health problems didn't prevent her from working. The General Division also found that the Claimant had not made enough effort to find a job that was better suited to her impairments.

[5] The Claimant requested permission to appeal from the Appeal Division. She alleged that the General Division had failed to appreciate the severity of her back pain.

[6] The Tribunal then sent a letter to the Claimant reminding her that the Appeal Division can only consider specific errors that the General Division may have made. The Tribunal asked the Claimant to provide more details about why she wanted to appeal.

[7] The Claimant replied several weeks later.[2] She again expressed her disagreement with the General Division's decision but this time also accused the presiding General Division member of treating her unfairly during the hearing. The Claimant specifically alleged that the member

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[1] General Division decision dated February 16, 2021.
[2] Claimant's letter dated May 28, 2021, AD1C.

- raced through the hearing, finishing it up in half the allotted time;
- disregarded medical reports—for which the Claimant had paid significant copying fees;
- displayed impatience and boredom while listening to witness testimony; and
- falsely accused a witness of attempting to coach the Claimant from off camera.

[8] The Claimant also alleged that the General Division found her capable of employment even though she has significant damage to her lower back and has never done anything except physical labour.

[9] I have reviewed the Claimant's medical file and the General Division's decision. I have concluded that the Claimant's appeal does not have a reasonable chance of success.

ISSUE

[10] There are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded unfairly;
- interpreted the law incorrectly; or
- based its decision on an important factual error.[3]

[11] An appeal can proceed only if the Appeal Division first grants leave to appeal.[4] At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.[5] This is a fairly easy test to meet, and it means that a claimant must present at least one arguable case.[6]

[12] I had to decide whether the Claimant had an arguable case.

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[3] The formal wording for these grounds of appeal is found in s 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[4] DESDA, ss 56(1) and 58(3).
[5] DESDA, s 58(2).
[6] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

ANALYSIS

[13] The Claimant alleges that the General Division member who heard her case behaved in ways that made her uncomfortable and nervous. She wonders whether she received a fair and unbiased hearing.

[14] I have listened to the entire audio recording of the General Division hearing. I see no basis for the Claimant's allegations.

There is no arguable case that the General Division rushed the hearing

[15] As indicated in the notice of hearing, the General Division scheduled the Claimant's videoconference for 90 minutes. The recording indicates that, from beginning to end, it lasted 66 minutes—well over 45 minutes alleged by the Claimant.

[16] The length of a hearing is not a reliable indicator of its quality. A well-prepared adjudicator often does not need a great deal of time to hear what evidence needs to be heard and to ask what questions need to be asked.

[17] In this case, I heard nothing to suggest that the member wanted the hearing over and done with. Quite the contrary. The member was clearly familiar with the details of the file. She asked relevant questions. She allowed the Claimant and her witness to take their time answering them. I did not hear the member cut off the Claimant or ask her to move along. The hearing proceeded efficiently but at a natural and unforced pace.

There is no arguable case that the General Division disregarded medical reports

[18] The Claimant alleges that, at the hearing, the General Division paid no attention to her medical reports, which she had spent considerable time and money to obtain.

[19] I don't see a reasonable chance of success for this argument. Members typically want claimants to have their complete medical file in front of them during the hearing. That does not mean they intend to discuss each and every piece of medical evidence—something that would be impractical and unnecessary under the circumstances. But it's sometimes useful to refer to specific test result or doctor's opinion. The fact that the General Division member never

mentioned a specific report during the hearing doesn't mean that she failed to consider it. Indeed, members are presumed to have considered all the material in the file unless it is proven otherwise.[7] Here, the Claimant has provided no such proof.

There is no arguable case that the presiding General Division member's attitude tainted the hearing

[20] The Claimant says that the General Division member's obvious boredom and hostility made her nervous and uncomfortable during the hearing.

[21] I don't see a reasonable chance of success for this argument.

[22] The Claimant undoubtedly felt a degree of anxiety when speaking to the member. Most people in the Claimant's position would find it stressful discussing their medical problems with a stranger—especially one with the power to award or deny them an important government benefit. However, I heard nothing in the hearing recording to suggest that the General Division member was impolite, impatient, or anything less than fully engaged with the material. Her tone was measured but friendly. She listened to what the Claimant and her witness had to say, but she also asked questions that were designed to draw key information from them. Except for one incident (see below), the Claimant did not show any outward sign of discomfort. For the most part, she seemed calm and composed, and she was able to present her evidence without difficulty.

There is no arguable case that the General Division made a false accusation of coaching

[23] At the outset of the hearing, the General Division member told the Claimant that her witness and common-law partner would have to be in another room while she was giving her testimony. Excluding witnesses is a common practice in court and tribunal hearings because it prevents one person's testimony from being influenced by another's.

[24] By consent, the Claimant's witness testified first. He then moved off camera and the focus shifted to the Claimant. Toward the end of the hearing, the member asked her questions

[7] *Simpson v Canada (Attorney General)*, 2012 FCA 82.

about conditions that hadn't been discussed previously. At one point,[8] when the member asked about the Claimant's hearing impairment, another voice could be heard indistinctly in the background. A short time later, there was this exchange:

> Member: Are there any other conditions that affect your ability to work?
>
> Claimant: I would say mostly my back and just my mental health… [pause] Mentally, yes.
>
> Member: Is he back there telling you what to say?
>
> Claimant: Oh no, he just heard me talking.
>
> Member: [Chuckling] Okay.
>
> Claimant No, no, he's in the other room. He must have heard me say "mentally." Like, he sees this, right?
>
> Witness: [Speaking inaudibly from a distance]
>
> Claimant: Yeah, that's what he's trying to say—I get depressed all the time.[9]

[25] This tells me that the General Division had a legitimate concern that the Claimant's common-law partner might have been attempting to feed the Claimant information or, at least, to prompt her to further elaborate on her answers. The Claimant's own words confirm that, even though he was in another room, her partner responded to something he heard in her testimony. However, the member did not seem angry or upset. She did not "accuse" the Claimant of breaking any rules. She simply asked the Claimant, in a mild tone, what her partner was doing. The member accepted the Claimant's explanation—not without a touch of humour—and then moved on.

[26] I don't see an argument that the member broke a rule of procedural fairness by raising this matter at the hearing.

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[8] Audio recording of hearing, 50:55.
[9] Audio recording of hearing, 51:10 to 51:50.

There is no arguable case that the General Division disregarded evidence

[27] The Claimant argues that the General Division dismissed her appeal in the face of medical evidence showing that she suffers from disabling back pain, among other conditions.

[28] I don't see a reasonable chance of success for this argument.

[29] One of the General Division's jobs is to make findings of fact. In doing so, it is entitled to some leeway in how it chooses to weigh the evidence. In this case, the General Division noted the following:

- Dr. Cheryl Smith, a family practitioner, said that the Claimant's job opportunities were limited. However, she did not rule out an eventual return to work.[10]
- Dr. David Smith, a pain specialist, said that the Claimant was responding to pain injections and would benefit from activity and exercise. He did not rule out further recovery.[11]
- There was no evidence that the Claimant's efforts to retrain or perform non-physical work were unsuccessful because of her health conditions.

[30] I don't see an arguable case that the General Division erred in making these findings. My review of its decision indicates that the General Division meaningfully analyzed the Claimant's testimony and her medical file in the context of her age, education, and work experience. The General Division acknowledged that the Claimant had lost some of her functionality but concluded that she was still regularly capable of a pursuing a substantially gainful occupation at the end of her coverage period.

[31] The Claimant may not agree with the General Division's decision, but it had a right to weigh the available evidence and make reasonable findings of fact.[12] The Claimant is asking me to reassess the evidence and substitute my judgment for the General Division's. I am unable to do so. My authority as an Appeal Division member permits me to determine only whether any of

[10] See Dr. Cheryl Smith's CPP medical report dated October 23, 2018, GD2-83.
[11] See Dr. David Smith's outpatient report dated July 4, 2018, GD4-48.
[12] *Simpson v Canada (Attorney General)*, 2012 FCA 82.

the Claimant's reasons for appealing fall within the three specified grounds of appeal and whether any of those reasons have a reasonable chance of success.

[32] I see nothing to suggest that the General Division ignored or mischaracterized evidence when it found that the Claimant was not disabled.

CONCLUSION

[33] The Claimant has not identified any grounds of appeal that would have a reasonable chance of success on appeal. Thus, leave to appeal is refused.

Member, Appeal Division

REPRESENTATIVE:	M. C., self-represented