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

Citation: *EB v Minister of Employment and Social Development*, 2021 SST 341

Tribunal File Number: AD-21-44

BETWEEN:

E. B.

Appellant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: July 9, 2021

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Claimant is a former homecare worker who has been diagnosed with chronic obstructive pulmonary disease (COPD). She stopped working in December 2017 and is now 56 years old.

[3] In December 2018, the Claimant applied for Canada Pension Plan (CPP) disability benefits. The Minister refused the application. In its view, the Claimant had not shown that she had a severe and prolonged disability during her minimum qualifying period (MQP),[1] which ended on December 31, 2013. The Minister also found no evidence of any disability that had started during the Claimant's prorated period, which ran from January 1, 2014 to January 31, 2014.

[4] The Claimant appealed the Minister's refusal to the Social Security Tribunal's General Division. The General Division decided that an oral hearing was unnecessary and based its decision solely on a review of the documentary record. On December 31, 2020, the General Division dismissed the appeal, finding insufficient medical evidence that the Claimant was disabled during her MQP or her prorated period. The General Division placed weight on the fact that the Claimant's earnings for 2015 were significantly above the maximum annual disability pension threshold for that year. The General Division also noted that her last employer described the Claimant as reliable and capable of light physical tasks.

[5] The Claimant requested leave to appeal from the Tribunal's Appeal Division. She said that she stopped working because she was sick. She said that she attempted to go back to work in

[1] The MQP is the period in which a claimant last had coverage for CPP disability benefits. Coverage is established by working and contributing to the CPP.

2017 but was unable to continue her job because of her COPD symptoms. She asked the Tribunal to consider her application again.

[6] After the Appeal Division reminded the Claimant of the permitted grounds of appeal, the Claimant responded with specific allegations against the General Division. She complained that the General Division hadn't given her a chance to explain her situation verbally. She suggested that the General Division should not have paid any attention to a questionnaire completed by her last employer. She claimed that the information in the questionnaire was unreliable.

[7] I granted leave to appeal because I thought there was arguable case that the General Division had not given the Claimant a full opportunity to be heard. I called a hearing by teleconference to discuss the Claimant's allegations.

[8] Now that I have heard both parties' arguments, I have concluded that the Claimant's allegations do not justify overturning the General Division's decision.

ISSUE

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

- followed an unfair procedure;
- made an error of law; or
- based its decision on an important factual error.[2]

[10] In this appeal, I had to decide whether the General Division acted unfairly by proceeding without an oral hearing. In particular, I considered whether the General Division denied the Claimant a chance to explain (i) her post-MQP earnings and (ii) her last employer's assessment of her work capacity.

ANALYSIS

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

[11] The Claimant says that, by holding her hearing on the record, the General Division denied her the chance to

- explain that she was disabled in 2015, even though she reported substantially gainful earnings in that year; and
- answer the questionnaire completed by her former employer, who the Claimant says was on drugs and who only wanted to make herself look good.

[12] I have heard arguments from both parties and concluded that the General Division's choice of hearing format was fair. Although the Claimant did not get an oral hearing, she was nonetheless given a full and meaningful opportunity to make her case. I came to this conclusion for the following reasons.

The law allows the General Division to choose its own hearing format

[13] The law gives the General Division a certain amount of freedom to choose a suitable hearing format for each case. The General Division can make a decision based on the documentary record or it can hold a further hearing, whether by written questions and answers, teleconference, videoconference, or personal appearance.[3]

[14] The freedom to choose a hearing format is not absolute and must be exercised according to the rules of procedural fairness. The concept of procedural fairness is variable and needs to be assessed in the specific context of each case. The Supreme Court of Canada has set out a list of factors to consider when determining the duty of procedural fairness, including the importance of the decision to the person challenging it, and their legitimate expectations in doing so.[4]

The Claimant could have asked for an oral hearing

[15] The Claimant's disability claim was important to her. She had a legitimate expectation that she would get an opportunity to present her evidence and arguments. In my view, the

[3] *Social Security Tribunal Regulations*, s 21.
[4] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (SCC).

General Division did give her that opportunity, but the record shows she did not take full advantage of it.

[16] The General Division's notice of appeal form asks claimants to state their preferred hearing format and gives them a choice of six options:

- ☐ No preference
- ☐ Videoconference (at a Service Canada Centre)
- ☐ By phone
- ☐ In-person (at a Service Canada Centre)
- ☐ Written questions and answers
- ☐ On the record hearing (the appeal will be decided based only on the information that has been submitted to the Tribunal)

[17] When the Claimant completed her notice of appeal in October 2019,[5] she checked the last option. The General Division presumably took this selection into account when it chose to decide the Claimant's appeal based on the documents on file.

[18] On September 14, 2020, the Tribunal sent the Claimant a letter informing her that her file was ready to be assigned to a member. The letter also informed her that she had until November 12, 2020, to submit any additional documents. At that point, the letter said, the member would either decide the matter on the record or, if necessary, schedule a hearing.

[19] The Claimant had previously notified the Tribunal that she was ready to proceed.[6] She did not submit any more documents. Three months later, the General Division issued its decision.

[20] Procedural fairness requires decision-makers to ensure that interested parties understand what they are up against. Self-represented parties in particular must be given a full and fair

[5] Claimant's Notice of Appeal – Income Security dated October 7, 2019, GD1-1.
[6] See Claimant's notice of readiness dated August 27, 2020, GD4.

opportunity to present their case. However, in this case, I can't blame the General Division for complying with the Claimant's clearly expressed preference.

[21] The Claimant says that she did not understand her options. I find that hard to believe, especially since the notice of appeal form went to some trouble to make it clear that selecting an on-the-record hearing would rule out oral evidence. As we will see, the Claimant was sometimes less than diligent in pursuing her claim. I think it is more likely that the Claimant filled out the appeal form without taking the time to truly understand what was in it.

The Claimant should have known what was in her file

[22] The Claimant admitted to me that she didn't review important written material, including the contents of her own file.[7] It appears that the Claimant was surprised to see that the General Division based so much of its decision on her post-MQP employment as a homecare worker. The Claimant shouldn't have been surprised. The Minister made it clear on two occasions that it was refusing her disability claim because she was working after her CPP disability coverage period ended in December 31, 2013.[8] The Minister later submitted a brief in which it argued that the Claimant's post-MQP employment suggested a capacity to perform a substantially gainful occupation, despite her claims otherwise.[9]

[23] The Claimant knew, or should have known, that her post-MQP earnings of $20,328 in 2015 and $6,856 in 2017 would be an issue at the General Division.[10] She had an opportunity to address those earnings in the year that it took for her file to be assigned to a General Division member. She could have explained in writing how, at a time when she was supposedly disabled, she managed to earn an annual income above the "substantially gainful" threshold. She never filed such an explanation.

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[7] Recording of hearing at approximately 15:00.
[8] Minister's initial refusal letter dated April 18, 2019, GD2-31; Minister's reconsideration letter dated September 23, 2019, GD2-40.
[9] Minister's submissions to General Division dated December 30, 2019, GD3.
[10] See Claimant's record of earnings, GD2-46.

[24] Likewise, the Claimant knew, or should have known, that her former employer had completed a questionnaire at the Minister's request.[11] In that questionnaire, D. N. wrote that the Claimant

- worked as a replacement for her usual worker from December 2014 until October 2015 and from July 2017 until December 2017;
- performed light housekeeping, prepared meals, helped with medication, helped her shower, and watched for seizures; and
- worked five hours per day, 35 hours per week, and recorded good attendance.

[25] The Claimant told me that she was not aware of D. N.'s questionnaire until after the General Division issued its decision. A claimant has a basic responsibility, if they wish their appeal to succeed, to familiarize themselves with the contents of their hearing file. That responsibility is all the more urgent when a claimant does not have the benefit of legal representation and can rely on no one but themselves to prove their claim. Here, the Claimant was in possession of a complete copy of her file.[12] If she had reviewed it with more care, she could have raised questions—in writing—about the reliability of her former employer's evidence. However, since the Claimant was apparently unaware of the questionnaire, she did not place herself in a position to respond to one of the Minister's key arguments.

Courts generally defer to the General Division's choice of hearing format

[26] The Federal Court has been reluctant to second-guess the General Division's choice of hearing format. In a case called *Brochu*,[13] the claimant did not rule out any particular format when he appealed to the General Division. The General Division proceeded to hear his case by teleconference, and the Appeal Division later decided that the choice of format had not violated his right to procedural fairness. The Federal Court found this decision reasonable. It rejected the claimant's arguments about observing demeanour when credibility is at issue. It found no

[11] See CPP Employer's Questionnaire completed by Dianne Norman on March 28, 2019, GD2-82.
[12] The Tribunal forwarded the Minister's file to the Claimant under cover of a letter dated December 6, 2019.
[13] *Brochu v Canada (Attorney General)*, 2019 FC 113.

evidence that that the Claimant would have presented anything differently had he been in an in-person hearing or in a videoconference.

[27] In *Parchment*,[14] a claimant argued that the General Division failed to observe a principle of natural justice by holding a hearing by teleconference instead of in person. The Appeal Division did not see anything wrong with this choice either. The Federal Court later found the Appeal Division's decision reasonable, relying in part on the fact that the claimant had not shown that he was disadvantaged by the teleconference.

[28] The Claimant was given an opportunity to make her case in writing and, at the same time, respond to the Minister's written brief. She did not make the most of that opportunity, but that was not the fault of the General Division or its choice of hearing formats. Moreover, the Claimant did not point to anything she might have said in an oral hearing that would have produced a different result. She had no evidence that her reported 2015 earnings were incorrect, nor did she refer to anything to counter her former employer's evidence except speculation and unsupported allegations.

The onus was on the Claimant to prove that she was disabled during her MQP

[29] The Claimant is an applicant for a CPP disability pension and, under the law, she had the burden of proving that she was entitled to it. It was up to her to understand, at least at a basic level, how the pension works. It was up to her to read the file and learn about the appeals process. It was up to her to make her case, as well as possible, in the manner prescribed by the General Division. It was up to her to, not just make her own arguments, but to anticipate the Minister's counter-arguments. It was up to her to show that she was regularly incapable of a substantially gainful occupation as of December 31, 2013 and continuously thereafter.

[30] Even if we set aside her post-MQP employment, the fact remains that the Claimant did not produce any medical evidence that was related to the period before 2014. As the General Division noted, the Claimant said in her application for CPP benefits that her health worsened in 2015. Indeed, all of her medical information dated from 2016—well after her coverage period

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

ended. In a recent case called *Dean*,[15] the Federal Court confirmed that CPP disability claimants must supply documentary evidence about their claimed medical condition at the time of their MQP.

[31] In the end, the General Division based much of its decision on the complete absence of medical reports from the most relevant period. I see no indication that it erred in doing so.

CONCLUSION

[32] For the above reasons, the Claimant has not demonstrated to me that the General Division committed an error that falls within the permitted grounds of appeal.

[33] The appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	June 18, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	E. B., Claimant Viola Herbert, representative for the Minister

[15] *Canada (Attorney General) v Dean*, 2020 FC 206.