



Citation: *ND v Minister of Employment and Social Development (Minister)*, 2021 SST 470

## Social Security Tribunal of Canada Appeal Division

# Decision

**Appellant:** N. D. (Claimant)  
**Representative:** I. D.

**Respondent:** Minister of Employment and Social Development (Minister)  
**Representative:** Hilary Perry

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**Decision under appeal:** General Division decision dated February 12, 2021  
(GP-19-1678)

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**Tribunal member:** Neil Nawaz

**Type of hearing:** Teleconference  
**Hearing date:** August 12, 2021  
**Hearing participants:** Claimant's representative  
Minister's representative

**Decision date:** September 8, 2021  
**File number:** AD-21-161

## **Decision**

[1] The appeal is dismissed.

## **Overview**

[2] The Claimant is a former self-employed paralegal. In May 2014, she had a stroke and has since experienced a progressive decline in her memory and cognitive functioning. She is now 67 years old.

[3] In January 2018, I. D., the Claimant's son and authorized representative, applied for a Canada Pension Plan (CPP) disability pension on his mother's behalf. The Minister approved the application after finding that the Claimant could no longer work because of a severe and prolonged disability. The Minister deemed the Claimant disabled as of October 2016, which it determined was the earliest date under the law that she could be approved for the disability pension.

[4] I. D. appealed the start date of his mother's pension to the General Division of the Social Security Tribunal. He said that his mother had been previously incapacitated from applying for the disability pension.

[5] The General Division held a hearing by teleconference and dismissed the appeal. The General Division found insufficient medical evidence to show that the Claimant was incapable of forming or expressing an intention to make an application before January 2018. In particular, the General Division placed weight on evidence that the Claimant had been working as a paralegal after her stroke and had later given power of attorney to her son.

## The Claimant's Allegations

[6] Earlier this year, I. D. asked the Appeal Division for leave, or permission, to appeal,<sup>1</sup> alleging that the General Division made the following errors in coming to its decision:

- (a) The General Division acted unfairly by
  - mentioning in its decision his mother's non-participation in the hearing, but not the Minister's;
  - failing to accommodate him as his mother's full-time caregiver;
  - referring to facts as "allegations" in its decision;
  - failing to consider the evidence impartially and without prejudice;
  
- (b) The General Division erred by
  - ignoring evidence of his mother's deterioration after her May 2014 stroke,<sup>2</sup> including:
    - her diagnosis of vascular dementia;
    - her symptoms, such as memory loss and double vision;
    - her doctor's suggestion to place her in a long-term care facility after her discharge from the hospital; and
    - her immediate retirement from her paralegal practice;
  - failing to realize that the Minister had already found his mother's disability severe by the time she signed the September 2017 power of attorney;

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<sup>1</sup> Claimant's application requesting leave to appeal from the Appeal Division dated May 13, 2021 (AD01), with supplemental reasons dated July 26, 2021, AD03).

<sup>2</sup> One of the issues before the General Division was whether the episode that sent the Claimant to Emergency in May 2014 was, in fact, a stroke. I. D. says that it was a stroke; the General Division found medical evidence suggesting otherwise.

- ignoring evidence that, after his mother's stroke, her paralegal license was appropriated and used by someone else for their personal benefit;
- finding, contrary to the evidence, that medication improved his mother's condition;
- ignoring evidence that I. D. completed his mother's application for the CPP disability pension precisely because she was incapable of doing it herself;
- inferring capacity from evidence that his mother gave consent to various medical procedures; and
- disregarding medical evidence that supported his mother's incapacity claim, including:
  - Dr. Mitchell's October 2020 certificate of incapability;
  - Dr. Shammi's April 2016 neuropsychological report;
  - Dr. Bida's October 2016 geriatrics report, specifically the Claimant's history, as relayed by her son;
  - Dr. Atwal's October 2016 internal medicine report; and
  - Dr. Masellis' April 2019 neurology report.

[7] Earlier this year, one of my colleagues on the Appeal Division granted permission to proceed because she thought this appeal had a reasonable chance of success. Last month, I held a hearing by teleconference to discuss the Claimant's allegations in full.

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

## **Issues**

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

- proceeded in a way that was unfair;

- acted beyond its powers or refused to exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important factual error.<sup>3</sup>

[10] My job is to determine whether any of the Claimant's allegations fall into one or more of the permitted grounds of appeal and, if so, whether any of them have merit.

## Analysis

### The General Division did not proceed unfairly

[11] I. D. has cited several instances in which the General Division allegedly displayed disrespect or bias toward him, his mother, and her claim. I know that I. D. is frustrated and upset by the appeals process, but I can see no indication that General Division violated any rule of procedural fairness in adjudicating his mother's appeal:

- I. D. notes that, in its decision, the General Division mentioned his mother's non-attendance at the hearing, but not the Minister's. If I. D. is suggesting that this omission indicated bias on the General Division's part, I don't see it. The General Division simply stated a fact, but it apparently drew no inferences from that fact. I suspect that the General Division did not refer to the Minister's absence because (and this is something many disability claimants are not aware of) the Minister almost never sends a representative to hearings of this kind.
- I. D. is angry that, as a full-time unpaid caregiver for his mother, he has spent three years "spelling out" what he sees as the mistakes of, first, the Minister's medical adjudicator and, now, the General Division. Again, I understand that I. D. is frustrated, but his mother's case is not unusual. It takes time and energy to pursue a disability claim. This is largely a function of a complex and multi-part process designed by Parliament to ensure that contributors to the

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<sup>3</sup> *Department of Employment and Social Development Act (DESDA)*, s 58(1).

CPP receive the benefits to which they are entitled. Unfortunately, advocacy, paperwork, and delay are sometimes parts of that process.

- I. D. objects to the General Division's use of the word "allegations" to describe what he insists are "facts." He argues that this terminology suggests a predisposition against his mother. I disagree. An allegation is an assertion or claim that hasn't yet been established. What may seem obvious to I. D. is not necessarily so to an outside observer. Establishing facts is the General Division's job. The General Division does this by weighing conflicting evidence and making findings. An allegation does not become a fact until it is proven. In its decision, the General Division uses the word allegation to describe just that—an assertion that hadn't yet been proven. I don't see how the General Division's use of that word was prejudicial.
- I. D. alleges in broad terms that the General Division was biased against his mother and her claim. I can find no evidence of this. Bias denotes a closed mind that is in some way predisposed to a particular result. 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 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?"<sup>4</sup> As discussed above, I found no error in how the General Division analyzed the evidence and applied the law. I reviewed its written reasons and saw nothing to suggest that the General Division did anything other than follow the evidence where it led. The General Division may not have found the Claimant incapacitated, but that did not mean it was in any way biased against her.

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<sup>4</sup> *Committee for Justice and Liberty v Canada (National Energy Board)* 1976 2 (SCC), 1978 1 SCR.

## **The General Division did not ignore evidence of the Claimant's post-stroke deterioration**

[12] I. D. alleges that the General Division overlooked various indicators of the Claimant's incapacity after her stroke.

[13] I carefully reviewed I. D.'s submissions on this point but was ultimately unable to agree with them. Tribunals such as the General Division are presumed to have considered all the evidence available to them and do not have to address each and every piece of evidence in their decisions. In any event, I am satisfied that the General Division considered all significant circumstances surrounding the Claimant's stroke and its aftermath:

- The General Division knew that the Claimant had been diagnosed with vascular dementia.<sup>5</sup> However, it correctly noted that a diagnosis cannot be equated with incapacity.
- The General Division acknowledged that the Claimant reported memory loss and double vision.<sup>6</sup> However, it found that these symptoms did not necessarily leave her unable to form or express an intention to make an application.
- The General Division was aware of discussions about placing the Claimant in a long-term care facility after her October 2016 hospital admission.<sup>7</sup> However, it decided that such discussions did not determine whether the Claimant was incapacitated.
- The General Division heard I. D.'s testimony that his mother had immediately retired from her paralegal practice following her May 2014 medical episode.

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<sup>5</sup> General Division decision, paras 15, 25, 34, and 51.

<sup>6</sup> General Division decision, paras 11, 53.

<sup>7</sup> General Division decision, para 15. The General Division may have been referring to a geriatric services outreach assessment report by Sheila Ingle, social worker, dated December 13, 2016, GD2-233.

However, it pointed to other evidence in the record suggesting that the Claimant continued to work in the months and years afterward.

[14] As mentioned, one of the General Division's roles is to establish facts. In doing so, it is entitled to some leeway in how it weighs evidence. The Federal Court of Appeal addressed this topic in a case called *Simpson*,<sup>8</sup> in which the claimant argued that the tribunal attached too much weight to selected medical reports. In dismissing the application for judicial review, the Court held:

[A]ssigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact.

[15] In this case, the General Division made a full and genuine effort to sort through the relevant evidence and assess its quality. I see no reason to second-guess the General Division's decisions to give some pieces of evidence more weight than others.

### **The General Division rightly placed no weight on the Minister's finding of disability**

[16] I. D. argues that the General Division ignored the Minister's finding that his mother was already suffering from a severe disability.

[17] I don't see an error here.

[18] Under the *Canada Pension Plan*, disability and incapacity are two different concepts. One is an inability to regularly pursue a substantially gainful occupation; the other is an inability to form or express an intention to make an application for disability benefits. The second is generally much harder to prove than the first. While the Claimant has cognitive problems, that does not necessarily mean she met the relatively heavy burden of proving that she lacked the ability to form or express an intention to apply for benefits.

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<sup>8</sup> *Simpson v Canada (Attorney General)*, 2012 FCA 82.



## **The General Division did not ignore evidence that someone appropriated the Claimant's paralegal license**

[19] One of the reasons the General Division found the Claimant capable was evidence in her doctors' notes that she continued to work as a paralegal after her stroke.<sup>9</sup> However, I. D. has always maintained that his mother did no real work after the May 2014 medical episode. He alleges that the General Division disregarded his testimony that someone fraudulently provided paralegal services in his mother's name.

[20] On this point, I fail to see how the General Division committed an error.

[21] The General Division was clearly aware of I. D.'s testimony that his mother was the victim of an unscrupulous operator. We know this because the General Division devoted a paragraph to this point in its written reasons:

[I. D.] also explained that a man took advantage of the Claimant. This man had the Claimant provide legal services, but he would collect and keep her fees. I. D. does not know what work she was doing, but thinks she was notarizing documents for immigration files. I. D. called the police, but this incident was not pursued.<sup>10</sup>

[22] The General Division went on to analyze the Claimant's work-related activities after her May 2014 medical episode:

The Claimant continued to work as a paralegal after her stroke in May 2014. I. D. indicated that she completed files that had been opened prior to her stroke. He drove her to appointments. It is unclear how long she continued to work as a paralegal and how much work she actually did. However, Dr. Bida noted her ongoing involvement in paralegal activities as late as October 2016. It is not until May 2017 that Dr. Mitchell wrote that the Claimant could no longer practice as a paralegal.<sup>11</sup>

[23] Barring a significant factual error in its analysis, the General Division had a right to assign minimal weight to I. D.'s attempt to explain or contextualize evidence that his mother was still working. The General Division apparently decided that I. D.'s

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<sup>9</sup> General Division decision para 41 and 69.

<sup>10</sup> General Division decision, para 20.

<sup>11</sup> General Division decision, para 69.

explanation was outweighed by other parts of his testimony suggesting that his mother was able to finish uncompleted files, combined with Dr. Bida's report that she was still working two years after her medical episode. I don't see how the General Division erred in finding that these activities indicated capacity.

### **The General Division did not err when it found that medication helped the Claimant**

[24] I. D. objects to the General Division's finding that his mother's condition improved with medication.

[25] I fail to see how the General Division made an error on this point. In its analysis, the General Division wrote:

I considered that, although the Claimant was admitted to the hospital with cognitive deficits in October 2016, her cognitive abilities improved significantly following her hospitalization. This is evident from Dr. Bida's report dated October 2016, in which it is noted that the Claimant is performing well on cognitive testing and her MoCA is in the normal range. Dr. Paramsothy also wrote that she is quite aware of her surroundings, her recall is adequate, and she is aware of her needs medically. Dr. Lu wrote in February 2017 and Dr. Tse wrote in April 2017 that she had normal levels of consciousness. Dr. Moghal wrote in February 2017 that she is stable and doing much better. **Dr. Mitchell noted improvement and that medication is helpful** in reports dated May 2017 and August 2017. **This is all confirmed by Dr. Masellis in April 2019, who indicated that medication has helped the Claimant's memory** since it was initiated in 2017 [emphasis added].<sup>12</sup>

[26] When I look at the underlying medical record, I see that the General Division accurately relayed remarks by two of the Claimant's physicians. On August 28, 2017, Dr. Mitchell wrote: "Cognition: Son feels that donepezil is helping, the decline isn't as stark, a bit more alert."<sup>13</sup> On April 4, 2019, Dr. Masellis wrote: "This memory decline and behavioral changes have responded well to Donepezil since it was initiated in 2017."<sup>14</sup>

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<sup>12</sup> General Division decision, para 64.

<sup>13</sup> Dr. Mitchell's consultation note dated August 28, 2017, GD2-326.

<sup>14</sup> Dr. Masellis' letter dated April 4, 2019, GD1-8.

[27] The General Division cannot be faulted for accurately describing medical reports and drawing logical conclusions from their contents. Contrary to I. D.'s allegations, the General Division did not misrepresent or distort evidence of his mother's improvement after taking medication.

### **The General Division did not ignore the circumstances around the Claimant's application**

[28] I. D. alleges that the General Division dismissed his mother's claim based on the mistaken impression that she knowingly signed her application for the CPP disability pension. He insists that he completed the application on his mother's behalf because she was incapable of doing it herself. He says that he got his mother to sign the application because Service Canada desk staff would not accept it otherwise. He maintains that his mother did not understand what she was signing.

[29] I don't see how the General Division committed an error here.

[30] Claimants do not succeed at the Appeal Division if they simply make the same arguments that they made at the General Division. I. D. has already argued at the General Division that the only way to file his mother's disability application was to have her mechanically sign the document without her knowing what she was signing. The General Division heard this argument and acknowledged it in its decision:

[I. D.] addressed the Claimant's application for the CPP disability benefit, which was completed in January 2018. He explained that he is the one who completed all of the applications on her behalf. He is also the one who originally signed the application on her behalf. However, he received a call from Service Canada advising that the Claimant had to sign the document. He took the Claimant to a Service Canada centre, explained to the Claimant that he is applying for CPP disability benefits for her, and asked her to sign the application, which she did in February 2018.<sup>15</sup>

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<sup>15</sup> General Division decision, para 22.

[31] The General Division later assessed I. D.'s argument in its analysis but found it lacking:

I. D. completed several forms on behalf of the Claimant, including a Consent for Service Canada to Obtain Personal Information, the Claimant's application for CPP disability benefits, and a Child Rearing Provision form. I will focus on the CPP disability application, which was signed by I. D. in January 2018 and subsequently signed by the Claimant in February 2018. Although I accept that I. D. completed this form on the Claimant's behalf, I do not accept that the Claimant was only capable of the physical act of signing the application. This is evident from I. D.'s testimony that he explained the purpose of the application to the Claimant prior to her signature.<sup>16</sup>

[32] My review of the hearing recording confirms the General Division's account: I. D. testified that he explained to his mother what he wanted her to sign.<sup>17</sup> He said that he did so even though he had gone to the trouble of having his mother sign an updated power of attorney only five months previously,<sup>18</sup> an act that itself cast doubt on his claim that his mother lacked capacity.

[33] I find it hard to fault the General Division for drawing rational inferences from the evidence before it.

### **The General Division did not err by inferring capacity from evidence that the Claimant consented to medical procedures**

[34] I. D. faced certain challenges in making a case that his mother was incapacitated. One of them was overcoming evidence that his mother had given informed consent to her treatment providers at a time when she was supposedly incapable forming or expressing an intention to make an application. As he did when attempting to explain his mother's signature on the updated power of attorney and on her disability application, he argued that she did not, in fact, know what she was agreeing to.

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<sup>16</sup> General Division decision, para 66.

<sup>17</sup> Recording of General Division hearing, 23:00 to 33:00.

<sup>18</sup> See power of attorney signed by the Claimant and dated September 1, 2017, GD2-50.

[35] I. D. made the same argument at the Appeal Division. He also suggested that the General Division had erred by failing to give that argument due consideration.

[36] Again, I don't see any error in how the General Division addressed this issue. The General Division considered and understood I. D.'s argument but, in the end, it simply didn't find it convincing. In its decision, the General Division noted that the Claimant had played a role in the management of her medical care, not just once, but multiple times:

The reports also indicate that, while it is true that I. D. assisted the Claimant, the Claimant was nonetheless capable of communicating her symptoms, consenting to medical treatment, and actively participating in her treatments throughout the claimed period of incapacity. For example, she was noted to provide consent to allow Dr. Bida to speak with I. D. in October 2016 and to a gastroscopy and colonoscopy in February 2017. Ms. Ingle obtained her written consent to place a copy of a report in her health record in December 2016.

The Claimant was noted to participate in appointments by providing medical history and answering questions in May 2016 by Dr. Axelrod, July 2016 by Dr. Sundaram, August 2016 and May 2017 by Dr. Mitchell, October 2016 by Dr. Faris, February 2017 by Dr. Moghal, and August 2017 by Dr. Aubrey.<sup>19</sup>

[37] I have reviewed the reports cited in the passage above and can confirm that the General Division fairly and accurately relayed their contents. In the end, the General Division did not believe I. D.'s testimony that his mother had no idea what she was consenting to. I suspect that the General Division disbelieved I. D. for the same reason it disbelieved him when he similarly testified that his mother had no idea what she was doing when she signed her updated power of attorney:

There is no indication that she did not understand what she was signing or why she was signing it. In fact, there are two witnesses that wrote that they did not believe her to be incapable of giving a continuing power of attorney.<sup>20</sup>

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<sup>19</sup> General Division decision, paras 65 and 66.

<sup>20</sup> General Division decision, para 71.

[38] The General Division had good reason to doubt I. D. when he testified that his mother lacked capacity, even though she was consenting to medical treatment and signing substantial and consequential legal documents. I see no reason to revisit the General Division's assessment of I. D.'s credibility where it has offered defensible reasons for discounting his testimony.

### **The General Division did not disregard medical evidence of the Claimant's incapacity**

[39] I. D. alleges that the General Division ignored selected medical reports supporting his mother's incapacity claim.

[40] I don't see merit in this submission. I saw no indication that the General Division considered the available medical information selectively or, to use a more informal phrase, "cherry-picked" evidence to come to a predetermined conclusion. As I noted earlier, a decision-maker is presumed to have considered all the evidence before it and can't be expected to discuss at length each and every document in its written reasons.

[41] As it happens, the General Division mentioned every one of the medical reports cited by I. D. but, for various reasons, gave each of them each little weight:

- In her October 2020 certificate of incapability, Dr. Mitchell declared that the Claimant had been incapable of managing her own affairs since 2015.<sup>21</sup> However, this declaration was at odds with other reports from Dr. Mitchell saying that the Claimant was able to participate in her medical appointments.
- In her April 2016 report, Dr. Shammi noted that the Claimant's cognitive test profile showed deficits in attention and visuospatial skills.<sup>22</sup> However, Dr. Shammi also said that, in the areas of working memory, language, memory, verbal reasoning, and concept formation, the Claimant's performance was average.

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<sup>21</sup> See General Division's discussion (at para 35) of Dr. Sara Mitchell's certificate of incapability dated October 19, 2020 (GD8-7).

<sup>22</sup> See General Division's discussion (at para 37) of Dr. Paritha Shammi's neuropsychological report dated April 18, 2016 (GD2-344).

- In her October 2016 report, Dr. Bida noted the Claimant's "gradual cognitive decline," as relayed her son, and her need for assistance with activities of daily living.<sup>23</sup> However, Dr. Bida also said that the Claimant scored 26/31 on the Montreal Cognitive Assessment and 27/30 on the Mini-Mental State Examination: "[T]here is a discrepancy between the severity of cognitive impairment on collateral history from the son and our findings on cognitive testing."
- In his October 2016 report, Dr. Atwal wrote that the Claimant was admitted to hospital because of confusion.<sup>24</sup> However, while Dr. Atwal noted "some cognitive impairment," he also said, "While I have seen her, she did not seem confused."
- In April 2019 report, Dr. Masellis wrote that the Claimant likely had Lewy Body Dementia with vascular dementia. He said that cognitive testing revealed a substantial decline in the Claimant's attention and executive functioning.<sup>25</sup> However, the General Division noted these findings in its decision and pointed to indications that much of the Claimant's decline had occurred after her son submitted her application in January 2018.

[42] It must be kept in mind that assessing incapacity for CPP purposes is a legal question as much as it is a medical one, and a physician's opinion is not necessarily the final word on the matter. In deciding whether the Claimant was incapable of forming or expressing an intention to make an application before January 2018, the General Division had to consider many factors, including the Claimant's medical condition and the effect of her condition on her day-to-day functioning. My review of the General Division's decision indicates that it

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<sup>23</sup> See General Division's discussion (at paras 41, 64 and 69) of Dr. Andreas Bida's geriatric medicine report dated October 26, 2016 (GD2-269).

<sup>24</sup> See General Division's discussion (at para 43) of Dr. Gulshan Atwal's discharge summary dated October 31, 2016 (GD2-266).

<sup>25</sup> See General Division's discussion (at paras 51 and 64) of Dr. Mario Masellis' neurology report dated April 4, 2019 (GD1-8)

conducted a detailed analysis of the Claimant's cognitive impairment and the degree to which it diminished her capacity between May 2014 and January 2018.

## **Conclusion**

[43] 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.

[44] The appeal is therefore dismissed.



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Member, Appeal Division