



Citation: *SB v Minister of Employment and Social Development*, 2023 SST 1954

Social Security Tribunal of Canada Appeal Division

Preliminary Decision

Applicant: S. B.
Representative: Paul Rochford

Respondent: Minister of Employment and Social Development
Respondent Representative: Marcus Dirnberger

Decision under appeal: General Division decision dated March 9, 2023
(GP-21-801)

Tribunal member: Kate Sellar

Decision date: November 29, 2023

File number: AD-23-360

Decision

[1] I am allowing the Minister's request. I will listen to the General Division hearing before I hold the Appeal Division hearing.

[2] I don't understand the Minister's representative to be asking that I revisit my leave granted decision in this matter as some kind of preliminary issue. I've received his submissions on the merits of the appeal as well as his witness information form stating his intention to call a physician at the new proceeding. His submissions ask that I dismiss the appeal, not that I revisit my decision on permission to appeal instead.

Background

[3] In December 2022, the law about Canada Pension Plan appeals at the Tribunal changed. The new law requires that if Appeal Division grants permission to appeal, the Appeal Division must hear and determine income security appeals as a new proceeding (*de novo* is the Latin word, which I'll avoid using in this decision).¹

[4] The law provides no additional information specific to listening to the audio of a General Division hearing as part of a new proceeding. The *Social Security Tribunal Rules of Procedure* are silent about whether Appeal Division members will listen to recordings of General Division decisions as part of the preparation on a new proceeding.

[5] As a matter of practice, the Tribunal transfers the General Division documents to the Appeal Division. Accordingly, the parties aren't required to file those documents again at the Appeal Division.² This is consistent with the general approach that **everything** (including the recording of the hearing) from the General Division's file forms part of the record at the Appeal Division unless an exception applies.

[6] Further, the Appeal Division tells the parties (and did so in this case) that it will not listen to the recording of the General Division hearing unless a party requests it.³

¹ See section 58.3 in the *Department of Employment and Social Development Act* (Act).

² See AD4.

³ See AD4.

[7] The Minister asked me to listen to the audio recording of the General Division hearing. The Claimant objects, stating that it's inconsistent with the approach to take in the context of a new proceeding under the new law.

Analysis

[8] Listening to the recording when a party requests it is a matter of discretion. I will exercise my discretion to listen to the recording in this matter. While taking this approach may not be consistent with a strict reading of the definition of new proceeding from a law dictionary, it is consistent with the way the federal courts have interpreted new proceedings in the administrative law context. Listening to the hearing when a party requests it will not change my fundamental approach to providing a new proceeding on the question of eligibility for the disability pension.

- The legal dictionary definition of a new proceeding is narrow.

[9] The Claimant argues that there is a commonly understood and accepted definition of a new proceeding. A new proceeding is a new trial on the entire case, that is on both questions of facts and issues of law, as if there had been no trial in the first.⁴

[10] I accept that is a legal definition of new proceedings from a law dictionary, but I must also consider more specific guidance about what new proceedings mean in the context of income security appeals at this Tribunal.

- Federal decisions discussing new proceedings in the immigration context reveal a pattern of openness to reviewing the materials from the previous proceeding.

[11] Before December 2022, once the Appeal Division decided that the General Division had made an error, one of its options for remedy was to return the matter to the General Division for reconsideration.

⁴ See AD7-2.

[12] In 2020, in a decision called RM, the Appeal Division considered what material the General Division can consider when conducting a new proceeding on return from the Appeal Division.⁵

[13] In RM, the Appeal Division concluded that a directive to hold a new proceeding allowed the General Division wide discretion to review materials that were available to, and generated by, a previous hearing.

[14] RM confirmed that the Federal Court and the Federal Court of Appeal have never considered what it means to hold a new proceeding at this Tribunal. However, in RM, there is a discussion of several cases from the Immigration and Refugee Board (IRB), which is another federal tribunal with two levels of decision making. RM discussed and considered these decisions:

- *Darabos v Canada*: The Federal Court found that using transcripts from previous hearings at the IRB is generally admissible before a newly constituted Board, provided that in the new proceeding the Claimant is provided with an opportunity to be heard and make representations on that transcript.⁶
- *Khalof v Canada*: The Federal Court found that the IRB didn't breach the rules of natural justice by allowing the transcript of the Claimant's testimony from a previous hearing at the same tribunal.⁷
- *Diamanama v Canada*: The Federal Court allowed a second panel at the IRB to use the transcript of the first hearing for whatever purposes it wished, even though the first hearing was overturned and there was a panel rehearing the claim.⁸

⁵ *RM v Minister of Employment and Social Development*, 2020 SST 743.

⁶ *Darabos v Canada (Minister of Citizenship and Immigration)*, 2008 FC 484.

⁷ *Khalof v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15172 (FC).

⁸ *Diamanama v Canada (Minister of Citizenship and Immigration)* [1996] F.C.J. NO 121 (Q.L.), (F.C.T.D.).

- *Cheema v Canada*: The Federal Court confirmed that in principle, it's acceptable in a new proceeding to use the transcript from the original hearing for whatever purpose it chooses (absent a procedural fairness problem in the first hearing).⁹

[15] These decisions from the federal courts aren't binding on the question of whether I ought to listen to the hearing in the context of the new legislation for income support appeals at this Tribunal.

[16] However, in my view they do show a pattern of openness to reviewing materials (including transcripts) from a previous decision maker at the same tribunal in a range of situations in which claimants are engaged in new proceedings. Accordingly, I find the direction that the Federal Court and Federal Court of Appeal took on these matters from the immigration context supports a similar approach here.

- **The fact that the Appeal Division is holding a new proceeding under its new legislation doesn't require a more narrow approach.**

The Minister argues that the Appeal Division should not depart from the decisions both under the old legislation and the new: a new proceeding doesn't preclude considering materials from the previous hearing, including the recording. The Minister notes that neither of the exceptions to this approach apply to this case.

[17] The Claimant argues that it's important to understand the RM decision in its proper context: just because the General Division could consider materials from the first General Division decision on a reconsideration under the previous legislation, it doesn't follow that the Appeal Division should consider General Division hearing records as part of its new proceeding under the new legislation.

[18] The Claimant argues that:

⁹ *Cheema v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1082.

- the Appeal Division's hearing is specifically designated a new proceeding, unlike the word "reconsideration" that applied in RM to the General Division under the old legislation.
- The current legislation also clearly acknowledges that judicial review of a decision on a leave to appeal is available.¹⁰
- Once the Appeal Division grants permission to appeal in the new scheme, the Appeal Division's role is to hold a new hearing separate from what has gone before. And then only after it has heard the evidence and arguments from the parties, the Appeal Division reviews the final outcome of that General Division decision, by deciding whether to uphold the original decision, vary it, or give its own decision on the matter.¹¹

[19] By contrast, the Minister notes that every step of the appeal process in an income security matter involves considering the decision that was made before, beginning with the Minister's own decision on reconsideration. The fact that the Appeal Division is now providing a new proceeding on income security appeals does not change that general approach.

[20] I'm not persuaded that the legislation requires me to take such a narrow view of a new proceeding the Claimant argues is necessary. I have an obligation to provide a new proceeding, and I view RM to be helpful in determining what that means – I will not depart from what RM says about accessing materials from the previous hearing based on the idea that the legislative context is different.

[21] After granting permission to appeal, the Appeal Division used to have the option of sending appeals back to the General Division to consider the matter on the merits again, to **reconsider**. And when the General Division reconsidered, it could review the recording of the first hearing.

¹⁰ See section 58.2(4).

¹¹ See section 59(1) of the Act.

[22] Now, once the Appeal Division grants permission to appeal, the legislation allows for the Appeal Division not to reconsider (because it hasn't considered the matter yet on the merits), but to hold a new proceeding on the merits.

[23] I cannot conclude that the use of the words **new proceeding** in the legislation means that the Appeal Division cannot consider the previous hearing at all or in any context. The Appeal Division will hold a separate hearing to what has gone before.

- **A new proceeding isn't defined by what aspects of the record the new decision maker can access.**

[24] A proceeding before the Appeal Division is still *new* even if it includes the full record that was before the previous decision-maker. The key is that the Appeal Division keeps an open mind and reviews all the evidence (including new documentary evidence and new testimony) as part of the new proceeding on the question of eligibility for the disability pension.

[25] It will be a new proceeding because the Appeal Division considers the matter on its merits, and the Appeal Division hasn't done that before (it's not reconsidering, it's deciding for the first time at this level).

[26] In this particular case, I'll review all the evidence including any new documents and testimony that the General Division didn't have. I'll be hearing all the arguments from the parties. I'll have the opportunity to ask my own questions about the evidence and the argument. I'll reach my own new decision about whether the Claimant is eligible for the disability pension. Flaws in a General Division decision, or testimony from the General Division might arise as a relevant part of considering all the underlying facts and completing an analysis that justifies my decision.

- **Listening to the hearing from the General Division is consistent with various other aspects of the Tribunal's role and its rules.**

[27] Listening to the General Division hearing on the request of the party is a matter of discretion, which I exercise in a way that is consistent with various other aspects of the Tribunal's role and its rules, as follows:

- The *Social Security Tribunal Rules of Procedure* (Rules) are silent on the question of listening to the General Division hearing.
- The Appeal Division controls its own process.
- The strict rules of evidence don't apply to the Appeal Division as an administrative tribunal.
- The Rules state that "evidence" includes testimony given at an oral hearing.¹²
- The Rules state that the appeal process should be simple, quick, and fair.¹³
- The Rules state that the Tribunal may decide the procedure for anything not in the Rules.¹⁴

[28] These factors all suggest that refusing to listen to the General Division hearing on request may be too rigid an approach to a new proceeding by this administrative tribunal. Consistent with these factors, listening to the recording of the General Division hearing affords the kind of flexibility the parties might require in a variety of situations.

[29] The value of listening to that recording, or the purpose for which any party wishes to use that audio recording, will vary depending on the circumstances. There may be appeals in which the claimant wishes to adopt their evidence from the General Division, or where the parties wish to narrow the remaining issues in terms of the claimant's eligibility for the disability pension. Refusing to even review the recording on the request of a party could close off arguments to that party on a relevant question about the Claimant's eligibility for the disability pension.

Conclusion

[30] I've agreed to listen to the General Division hearing because its consistent with the caselaw from the Federal Court and the Federal Court of Appeal about what a new

¹² See section 4 of the *Social Security Tribunal's Rules of Procedure* (Rules).

¹³ See section 8(1) of the Rules.

¹⁴ See section 8(5) of the Rules.

proceeding means in other contexts. Also, my view of the legislation and the Tribunal's rules suggests I have the discretion to decide to listen to the recording. Listening to the recording is also consistent with providing a simple, quick, and fair process.

[31] I will listen to the recording of the General Division hearing. Then I will hold an oral hearing in which I am open to hearing all the evidence and arguments from both parties that will help me to newly decide whether the Claimant is eligible for the disability pension.

Kate Sellar

Member, Appeal Division