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

Citation: *R. D. v Minister of Employment and Social Development*, 2019 SST 323

Tribunal File Number: AD-18-761

BETWEEN:

R. D.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: April 2, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] R. D. (Claimant) completed high school and obtained a college diploma as a Personal Support Worker. She injured her back at work in 2005 and continued to work until 2009. In 2009,she stopped working due to ongoing back pain although she later attended an 18-month retraining program and obtained a diploma in office administration.

[3] In 2013, the Claimant applied for a Canada Pension Plan disability pension and claimed that she was disabled by the ongoing pain and limitations from the back injury. The Minister of Employment and Social Development refused the application. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division held a hearing and dismissed the appeal, finding that the Claimant did not have a severe disability at the relevant time. The Claimant appealed the General Division decision to the Tribunal's Appeal Division. The Appeal Division allowed the appeal and referred the matter back to the General Division for reconsideration. The General Division again dismissed the appeal. The Claimant's appeal from this General Division decision is dismissed because there is no apprehension of bias by the General Division.

ISSUE

[4] Was there an apprehension of bias when the General Division reconsidered the Claimant's appeal?

ANALYSIS

[5] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It sets out only three grounds of appeal that the Appeal Division can consider. They are that the General Division failed to observe a principle of natural justice or made a jurisdictional error, made an error in law, or based its decision on an erroneous finding of

fact made in a perverse or capricious manner or without regard for the material before it.[1] The Claimant's ground of appeal that there is an apprehension of bias because the same General Division member reconsidered its original decision is considered below.

[6] When this appeal was first considered by the General Division, the Tribunal Member held a teleconference hearing. The Claimant testified. The General Division considered all of the written evidence and the testimony. It concluded that the Claimant did not have a severe disability because her condition worsened after the minimum qualifying period (the date by which a claimant must be found to be disabled in order to receive the disability pension),[2] the medical evidence at that time did not suggest that the Claimant was incapable regularly of pursuing any substantially gainful occupation,[3] the Claimant successfully attended an 18-month full-time retraining program, and testified that she could have done office work so long as she could alternate positions.[4]

[7] The Appeal Division allowed the appeal from this decision because the General Division erred in law when it failed to consider the Claimant's personal circumstances as required under the *Villani*[5] decision. The Appeal Division referred the appeal back to the General Division for reconsideration. The General Division reconsidered the appeal based on the documents that were filed with the Tribunal. It again dismissed the appeal.

[8] The Claimant argues that there is an apprehension of bias because the same Tribunal Member considered the appeal initially and upon reconsideration. She says that a reasonable person would think that the Tribunal Member was biased because he had already made a decision on the same facts and had been found to have erred in making the decision. In addition, the Tribunal Member did not "look afresh" at all of the evidence, but only considered and applied the principles from *Villani* when it reconsidered the appeal.

[9] The principles of natural justice are concerned with ensuring that all parties to an appeal have the opportunity to present their case to the Tribunal, to know and answer the legal case

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[1] DESD Act s. 58(1)
[2] General Division decision of 2016 para. 28
[3] *Ibid.* para. 30
[4] *Ibid.* para. 12
[5] *Villani v. Canada (Attorney General*), 2001 FCA 248

against them, and to have a decision made by an unbiased decision maker based on the law and the facts. These principles are offended if there is a reasonable apprehension that the decision maker was biased.

[10] When considering whether there was an apprehension of bias, one must start with the strong presumption that the General Division member was impartial.[6] This presumption can be rebutted, but the threshold to do so is a high one. It cannot rest on mere suspicion, pure conjecture or the impressions of a claimant. It must be supported by material evidence demonstrating conduct that derogates from the standard.[7] Further, the test for a reasonable apprehension of bias was set out by the Supreme Court of Canada as follows:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information... [The] test is "what would an informed person, viewing the matter realistically and practically and having thought the matter through conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly".[8]

[11] The mere fact that the same General Division member reconsidered their earlier decision is insufficient to establish an apprehension of bias. The Claimant failed to provide any other evidence of bias. An informed person, viewing the matter realistically would not conclude that the General Division was biased on this basis as the Claimant's impressions are insufficient to meet the legal test for an apprehension of bias.

[12] The Claimant also argues that there is an apprehension of bias because the General Division did not look afresh at all of the evidence before it made its decision in 2018. However, this is not required. The Appeal Division referred the matter back to the General Division for reconsideration.[9] A reconsideration of an appeal is not, by its nature, an entirely new hearing.[10] Absent directions from the Appeal Division, it is for the General Division to decide what form the reconsideration hearing should take. There is no suggestion that the General Division exercised its discretion improperly when it decided to conclude the matter based on the written

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[6] *Wewaykum Indian Band v. Canada*, 2003 SCC 45
[7] *Arthur v. Canada (Attorney General)*, 2001 FCA 223
[8] *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 SCR 369
[9] Appeal Division decision January 2018
[10] *Francella v. Canada (Attorney General)*, 2003 FCA 441

record. The Claimant did not object to it proceeding in this way. The parties did not present additional evidence for the General Division to consider, or make any new legal argument. Therefore, the failure to hold an entirely new hearing was not an error.

[13] Regarding its prior decision, the General Division stated

> I adopt the evidence, analysis, and conclusion in the initial GD decision dated March 7, 2016 wherein I determined the Claimant did not have a severe disability on or before her MQP of December 31, 2010. I failed in that decision to provide an analysis of the Villani factors, and for that sole reason, the AD allowed the Claimant's appeal, and referred the matter back to the GD for reconsideration. The required analysis is hereinafter set out.[11]

[14] It was also appropriate for the General Division to adopt its prior analysis in this case. The statement that the General Division adopted its prior conclusion is more troublesome. However, when read in context with the remainder of the decision, it does not demonstrate that the General Division had prejudged the matter or that there was an apprehension of bias. Immediately after the statement that the General Division adopted its prior conclusion, the General Division considered the Claimant's personal circumstances, as required in *Villani*. Therefore, the conclusion that the General Division adopted was that the Claimant was not disabled, before her personal circumstances were considered. The General Division then considered that the Claimant was at least 20 years younger than the traditional age of retirement in Canada, that she had a post-secondary education, was fluent in English and transferable skills. It concluded that this did not affect her capacity to pursue substantially gainful employment.[12]The General Division then logically and intelligibly concluded that the Claimant was not disabled at or before the MQP. It made no error in this regard.

CONCLUSION

[15] The appeal is dismissed for these reasons.

Valerie Hazlett Parker
Member, Appeal Division

[11] General Division decision 2018 at para. 8
[12] General Division decision 2018 para. 9

HEARD ON:	March 20, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	R. D., Appellant Hannah Barrick, Representative for the Appellant Viola Herbert, Representative for the Respondent