



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. S. v Canada Employment Insurance Commission*, 2020 SST 54

Tribunal File Number: AD-19-468

BETWEEN:

J. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: January 28, 2020

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, J. S. (Claimant), is appealing the General Division's decision of June 7, 2019.

[3] The General Division found that the Claimant knowingly made false statements in her claim for Employment Insurance benefits. In particular, it found that she falsely claimed that she had worked for an accounting firm, from March 7, 2011 to April 29, 2011. It found that she also falsely claimed that she had accumulated 312.3 hours of insurable employment from this employment. The Claimant needed these hours because she did not otherwise have enough insurable hours to qualify for Employment Insurance benefits. Having found that she made false statements, the General Division concluded that the Claimant was disqualified from receiving Employment Insurance benefits. The General Division's decision meant that the Claimant had to repay benefits that the Respondent, the Canada Employment Insurance Commission (Commission), had already paid to her.

[4] The Claimant argues that she did not get a fair hearing when she appeared before the General Division on June 12, 2018.

[5] For the reasons that follow, I am dismissing the appeal.

ISSUE

[6] The only issue before me is whether the Claimant received a fair hearing before the General Division.

ANALYSIS

[7] The Claimant argues that she did not get a fair hearing before the General Division. She claims that she has medical issues that affected her ability to give evidence. She testified at the

General Division that she is 60 years old, a diabetic, and that she has a back condition that limits her sitting tolerance. Her representative testified that they are both disabled and receiving disability support benefits.

[8] The Claimant also claims that she had to leave the hearing before she could finish giving evidence. The Claimant argues that because she had to leave the hearing early, the General Division member should have given her another chance to clarify or finish her responses.

[9] The Claimant did not ask for a break or an adjournment of the proceedings so that she could give evidence at a later time.

(a) Background Facts

[10] I have listened to the audio recording of the General Division hearing. The hearing lasted under one hour. Both the Claimant and her representative—her spouse—were at the hearing the whole time.

[11] The General Division member invited the Claimant and her representative to freely give evidence. Before concluding the hearing, the member asked the Claimant and her representative whether they had anything else they wanted to say. The Claimant's representative reiterated that they wanted the Social Security Tribunal's assistance because "we're old guys."¹

[12] There is no allegation that the General Division member deprived the Claimant of an opportunity to present her case. However, the Claimant objected to the nature of the questions that the General Division member asked. The Claimant found them intrusive, difficult to answer, and embarrassing.

[13] During the hearing, the General Division member asked the Claimant questions about her work at the accounting firm. The questions tested the Claimant's familiarity with the firm. If she could answer the questions, such as the time of day that she worked, this would suggest that her employment was legitimate. Otherwise, generally it would not reflect well on her credibility if she had difficulty or was unable to answer any of these types of questions.

¹ At approximately 54:11 of the audio recording of the General Division hearing.

[14] The Claimant's representative objected to these questions. Indeed, there were several times when he also attempted to give evidence on behalf of the Claimant. The Claimant and her representative questioned why the General Division member should be entitled to know anything about her employment with the accounting firm. The Claimant's representative protested the questions:

We are old guys, sick guys and I'm hurting. And it's an insult for us too. Whatever decision you want to make is up to you.

...

After that, I'm not going to answer any questions, the way you're asking questions of my wife and myself. We're hurting. We're sick people.²

...

We don't want to answer any more questions. ... You're doing your job, but consider that at least, you know, we're old people, we're sick people. We are feeling very embarrassed and [illegible – multiple voices speaking simultaneously].³

[15] The Claimant says that she was unwell during the General Division hearing. She suggests that she was unable to properly give evidence because of her medical condition. The Claimant obtained a health status report from her physician a week after the hearing. The physician prepared the report in support of the Claimant's application for Ontario Disability Support.⁴

[16] The physician indicated that the Claimant had minimal symptoms or signs affecting her intellectual function, judgment, memory and thinking.⁵ However, in the same report, the physician was also of the opinion that the Claimant had medium or moderate limitations requiring memory. The physician was also of the opinion that the Claimant might need a slightly longer time to comprehend things, express herself or verbally communicate. Occasionally, she might be unable to complete a task with or without accommodation and with or without moderate pain.⁶

² At approximately 42:40 of the audio recording of the General Division hearing.

³ At approximately 44:30 of the audio recording of the General Division hearing.

⁴ See physician's health status report dated June 28, 2018, at AD1A, particularly at AD1A-11. (Third page of report is missing.)

⁵ See physician's assessment at AD1A-11.

⁶ See physician's assessment at AD1A-17.

[17] As I indicated in my leave to appeal decision, ordinarily the Appeal Division does not accept new evidence. However, there are exceptions to this general rule. For instance, if the new evidence relates to one of the grounds of appeal under subsection 58(1) of the *Department of Employment and Social Development Act*, then I may consider that evidence. That is the purpose for which the Claimant relies upon the physician's report. She is relying on the report because she claims that it shows that she lacked the capacity to give evidence.

[18] I noted in my leave to appeal decision that the physician's health status report did not clearly establish that the Claimant lacked the requisite capacity to give evidence. Nevertheless, I granted leave to appeal because I was satisfied that the report suggested that her medical condition could have affected the Claimant's memory during the hearing and impaired her ability to give evidence. I invited the Claimant to provide evidence to support her claim that she could not give evidence.

(b) Tribunal's Questions to the Claimant

[19] The Claimant asked this appeal to be by written questions and answers. She did not ask for any other type of hearing, such as an in-person hearing or teleconference. I granted her request and asked her the following questions:

1. Does the Claimant have any other medical evidence to support her claim that she was unable to give evidence at the General Division hearing on June 12, 2018? If so, the Claimant should produce this evidence.
2. The Claimant says that she did not properly answer questions at the General Division because she was feeling unwell. Which questions did she not answer properly and how would she have answered if she had been feeling better?
3. Was there other evidence that the Claimant wanted to give regarding her employment with the accounting firm? If so, what was this evidence?
4. Given that her employment with the accounting firm was in 2011, what documents or what evidence does the Claimant rely upon to refresh her memory?
5. The Claimant first learned about the Commission's investigation into her employment with the accounting firm in about 2013. The Commission interviewed the Claimant in 2015. This was obviously closer in time to her employment with the accounting firm. Was the information that the Claimant provided at that time reliable? If so, why should the General Division not be able

to rely on this earlier information regarding her employment in 2011, rather than any new evidence that she might now be able to produce?

[20] The Claimant was, of course, welcome to provide any additional answers or information.

(c) Claimant's Responses to the Tribunal's Questions

[21] The Claimant filed several medical records. They confirm a diagnosis of type 2 diabetes, osteoporosis, osteoarthritis, and a mood disorder. She experiences chronic low back and neck pain.⁷

[22] The Claimant also filed a copy of the accounting firm's business card. The Claimant argues that her record of employment, T4 slip, pay slip and 2011 income tax return are conclusive proof that she worked at the accounting firm in 2011. The General Division had these records available before it.

(d) Review of Medical Records

[23] The Claimant argues that she was unfit to give evidence at the General Division hearing because of her medical conditions. I acknowledge that the Claimant has several medical conditions, but the existence of these conditions alone does not establish fitness.

[24] In addition to the records that I described above, the Claimant also relies on the following records:

- Sickness certificate dated July 19, 2011⁸ – confirms that the Claimant has a back problem.
- Diagnostic imaging of lumbar spine, dated June 17, 2015⁹ – findings are of mild degenerative changes in the lower back.

⁷ See medical records at AD3 and AD4.

⁸ Sickness certificate at AD1-20 and GD3-22.

⁹ Diagnostic imaging taken on June 2015, at AD3-5.

- Consultation report dated November 9, 2015, prepared by rehabilitation medicine specialist¹⁰ – Claimant referred for chronic low back pain. Treatment plan recommended. No discussion regarding the Claimant’s fitness to give evidence.
- Report dated April 17, 2017 of endocrinologist¹¹ - diagnosis of type 2 diabetes mellitus, osteoporosis. No discussion of any symptoms.
- Laboratory summary / diabetes assessment dated April 17, 2017 – again, no discussion of any symptoms.
- X-rays of lumbar spine taken on May 25, 2018¹² - radiologist was of the opinion that the x-rays showed anterior osteophytes.
- Bone density report taken on May 25, 2018¹³ - showed low bone mass.
- Consultation report dated June 13, 2018, prepared by the rehabilitation medicine specialist¹⁴ who saw the Claimant in follow-up. The Claimant complained of neck pain that went down to her feet. The Claimant reported decreasing mood and chronic fatigue. She reported that walking for 15 to 20 minutes aggravated her pain. She reported experiencing vertigo with laying down. She also did not get much sleep, unless she used Lyrica. She had been diagnosed with osteopenia. Otherwise, there were no new concerns. The specialist diagnosed the Claimant with diffuse body pain, a mood disorder and likely fibromyalgia that was affecting her mood. The specialist recommended that she attend physical therapy.
- List of medications that the Claimant took from May 31, 2018 to October 30, 2018.

¹⁰ Consultation report dated November 9, 2015, at AD3-8 to AD3-9.

¹¹ Report dated April 17, 2017, at AD3-3.

¹² X-rays of lumbar spine taken on May 25, 2018, at AD3-6.

¹³ Bone density report taken on May 25, 2018, at AD3-7.

¹⁴ Consultation report dated June 13, 2018, at AD3-10 to AD3-11.

(e) Claimant's fitness to give evidence at the General Division hearing

[25] I accept that these medical records show that the Claimant has chronic back and neck pain, a mood disorder, and possible fibromyalgia. However, I find that the medical records, taken together, fall short of establishing that the Claimant's medical issues impaired the Claimant's memory or concentration to such an extent that they rendered her unfit or incapable of giving evidence.

[26] The Claimant has not produced any medical opinions that say or suggest that she cannot or should not give evidence or that she has difficulty with her concentration and recall. The initial records that the Claimant relied upon were conflicting and the physician did not explain the basis upon which he came to his conflicting opinions.

[27] The Claimant saw a specialist within a week after the General Division hearing. She was able to meet with the specialist and provide a medical history. There does not appear to have been any discussion or concerns raised that the Claimant had difficulties with her memory or concentration to such an extent that she could not give a history, let alone give evidence.

[28] I have no doubt that she has chronic fatigue and that she may get little sleep, but there is no evidence to show that they impair her to the extent that she was unable to testify at the General Division hearing. For instance, there is nothing to show that the Claimant's short- or long-term memory and orientation as to time and place are severely impaired. There is nothing to show either that the Claimant cannot understand simple questions or give coherent answers.

[29] I find that there simply is insufficient evidence to establish that the Claimant was incapable of giving evidence on her own behalf at the General Division hearing. In addition, I find that the General Division member gave the Claimant a fair opportunity to fully present her case. In short, I find that she did have a fair hearing before the General Division.

(f) Was a new hearing appropriate?

[30] If the Claimant had established that she did not receive a fair hearing, the remedy for an unfair hearing usually is to offer a new hearing.

[31] But, if the Claimant does not have any evidence to give that she has not already given, and if her evidence and arguments remain unchanged, then there would have been little point in ordering a new hearing in this case.

[32] In the event that the Claimant might have produced sufficient evidence to show that she had been unfit to give evidence, I gave her a chance to answer some of the questions that the General Division asked her. I gave her the chance to do this without the pressure of an in-person hearing.

[33] I asked the Claimant what evidence she would have given about her work with the accounting firm. The Claimant had more than a month to reflect on the questions. During this time, the Claimant could have checked her records or any notes about her work at the accounting firm. She could have consulted her husband, family, friends, or anyone else, to see if they could help her recall anything about her employment.

[34] Significantly, I notice that the Claimant's representative says that the accounting firm continues to operate and do business.¹⁵ Yet, there has been no effort to seek any further information from this firm to show that the Claimant worked there.

[35] Several years passed between the time the Claimant allegedly worked at the accounting firm and the time she appeared before the General Division. She had already produced some records. The Commission had also interviewed the Claimant in November 2015. The Commission recorded the Claimant's answers to the interview questions.¹⁶

[36] The Claimant wrote to the Commission after the November 2015 interview.¹⁷ She wrote again in October 2016.¹⁸ She challenged the Commission's findings that the Record of Employment contained false or misleading information. She argued that the Commission should provide written proof that the Record of Employment was false. She denied that she had any involvement in preparing the Record of Employment. So, she argued that if the Record of

¹⁵ See Claimant's representative's letter dated October 25, 2019, at AD3-2.

¹⁶ See Report of Interview, conducted on November 2, 2015, at GD3-56 to GD3-58.

¹⁷ See Claimant's letter dated November 2, 2015, at AD4-5.

¹⁸ See Claimant's letter dated October 24, 2016, at GD3-71 to GD3-72.

Employment turned out to be “fake” or contained any mistakes, she should not be penalized or bear any responsibility.

[37] The Commission called the Claimant again in December 2016 and revisited some of the questions it had asked in November 2015, regarding the Claimant’s alleged employment.¹⁹ The Commission spoke with the Claimant’s spouse. The Commission recorded these responses.

[38] The Claimant’s representative argues that none of the information that the Commission recorded from the November 2015 interview is true. He says that any allegations are baseless and the Commission’s evidence is unreliable.

[39] Yet, neither he nor the Claimant have ever offered any other responses to the Commission’s questions. They have not offered any evidence to attempt to counter the Commission’s record of the interviews in November 2015 and December 2016, other than the Claimant’s Record of Employment, T4 slip, pay stubs and 2011 income tax return.²⁰

[40] When the Claimant appeared before the General Division, the member asked the Claimant some of the same types of questions that the Commission had asked. The member strove to test the truthfulness of the documents upon which the Claimant relied to prove that she had worked at the accounting firm.

[41] As the member noted, the Claimant had initially declared that her work at the accounting firm was not steady. Her spouse confirmed that the Claimant worked part-time. She had also declared that she never received any pay stubs and that the employer paid her cash. The Claimant subsequently produced pay stubs from the accounting firm. The pay stubs suggested that the Claimant worked on a full-time basis, averaging 40 hours per week, at the accounting firm.²¹ This was on top of her other full-time employment elsewhere. And, yet the Claimant had initially stated that the work was not steady and that she had worked just part-time. The General Division member also asked the Claimant about the nature of her work.

¹⁹ See Supplementary Record of Claim, dated December 14, 2016, at GD3-87 to GD3-88.

²⁰ See Record of Employment, at GD3-19 and GD3-75. T4 slip at GD3-86 and GD3-96, pay stubs are at GD3-77 to GD3-78 and GD3-84 to GD3-85, and 2011 income tax Notice of Assessment is at GD3-76.

²¹ See pay stubs at GD3-77 to GD3-78 and GD3-84 to GD3-85. The final pay stub suggested that she had 72 hours for the final biweekly period.

[42] I do not see that the Claimant has ever been able to respond to more specific questions about the work that she allegedly performed at the accounting firm. I also do not see that she has ever been able to address the conflicting evidence that she herself had offered about when and how much she worked at the accounting firm.

[43] There is vague and conflicting evidence over whether she worked full-time or part-time, and the days and the time of day or evening when she allegedly worked. She stated at first that she worked on an on-call basis, for a few hours in the day or evenings, for the accounting firm. In the same conversation, she worked steadily during the day. Later, this changed to working eight hours in the evenings.²²

[44] In the phone interview in December 2016, the Claimant (through her spouse) reported that she did not have steady work and that she worked part-time. Yet, this information contrasted with the pay stubs that suggested she had steady work and that she worked on a full-time basis. This was on top of the full-time work she had elsewhere.

[45] Neither the Claimant nor her spouse have been able to address these glaring discrepancies. Basically, the Claimant's argument simply is that all the information about the Claimant's employment is contained in the Record of Employment, T4 slip, Notice of Assessment, and pay stubs.

[46] The Claimant's spouse confirms that, at this point, the Claimant is unable to recall anything from the past.²³

[47] Given these considerations, even if there had been sufficient evidence to show that the Claimant was unfit to give evidence at the General Division hearing, I would not have ordered a rehearing. I gave the Claimant a chance to justify a rehearing. I gave her a chance to explain what other evidence she might have.

[48] Concerned over the passage of time since she allegedly worked at the accounting firm, I asked the Claimant what she might need to rely on to refresh her memory. There is nothing apart

²² See Report of Interview, *supra*.

²³ See Claimant's letter dated October 25 2019, at AD3-2, para. 2.

from what she has already produced. She relies on the same pay stubs, Record of Employment, 2011 T4 slip and 2011 Notice of Assessment.

[49] The Claimant has not provided me with any evidence to suggest that a rehearing is appropriate. She does not have anything new or extra to provide, on top of what she has already given. She has produced a business card from the accounting firm, but this does not address the question of whether she worked there in 2011. Her representative confirms that the Claimant does not recall anything from her past and would be unable to respond to any questions.

[50] In any event, the Claimant is not asking for a new hearing. Essentially she is asking me to accept the 2011 T4 slip, 2011 Notice of Assessment, pay stubs, and Record of Employment. She is asking me to accept that these documents prove that she worked 312 hours at the accounting firm. She is also asking me to reject the Commission's arguments to reject the truthfulness of these documents.

(g) Reassessment Based on the Existing Evidence

[51] If I had found that the Claimant did not have a fair hearing, instead of sending the matter back to the General Division for a new hearing, I could have conducted my own assessment, given the circumstances. The Claimant did not seek a new hearing and says that she can no longer remember the past.

[52] The Claimant wanted an assessment based on the records. For this reason, I would have chosen to conduct an assessment based on the records. There is as complete an evidentiary record as there will ever be. The Claimant is unable to recall much, if anything, and there are no new records or witnesses. Any assessment would have been based on the existing evidence.

[53] The Claimant relies on the same documents. She argues that I should accept that the pay stubs, the Record of Employment, 2011 T4 slip, and income tax notice of assessment are conclusive proof of her 2011 employment.

[54] Yet, even if I set aside the Claimant's arguments about the Commission's interviews in November 2015 and December 2016, I would have been unable to overlook the fact that the documents themselves raise questions. I would have subjected these documents to the same level

of scrutiny that the General Division member did. I would have also asked the same questions to satisfy myself about the truthfulness of these documents. The Claimant would have been no further ahead.

[55] The discrepancies in the Claimant's work schedule and her hours would have been too glaring to be able to somehow overlook. The Claimant was dismissive of the information that the Commission recorded from the two interviews, but she offered no counter-response other than a blanket denial that the Commission's information was accurate.

[56] The Claimant maintains that the Record of Employment, pay stubs, and tax information are more reliable. The fact that the Claimant could not and has never offered important details about her work, or address the inconsistencies that she also gave, would however greatly undermine the veracity of the documents. Without other evidence to support the documents, much like the General Division, I would have also rejected the documents as an accurate reflection of the Claimant's employment with the accounting firm.

CONCLUSION

[57] In summary, I do not find that the evidence establishes that the Claimant was unfit or incapable of giving evidence. I am satisfied that the Claimant received a fair hearing and that she was able to testify and present her case.

[58] Even if the Claimant had not received a fair hearing, I find that a new hearing would have not been warranted because the Claimant confirms that she has no evidence to offer, other than the documents that she has already produced. She says she no longer remembers the past. Her evidence and arguments would have remained unchanged.

[59] If I had found that the Claimant was unfit to give evidence at the General Division hearing, I would have reassessed the evidence on record.

[60] The Claimant relies on the Record of Employment, pay stubs, and 2011 tax information to re-argue her case and establish that she worked at the accounting firm in 2011. But, I find that these documents do not firmly establish the Claimant's employment at the accounting business. Rather, they cast doubt on whether she could have ever been employed at the business. At the

very least, the records greatly inflate or exaggerate any employment she might have had. The documents raise questions, which the Claimant has been unable or unprepared to address. Or, if she has addressed those questions, she says that the information that she reported in the first place cannot be relied upon. The documentary evidence regarding the Claimant's alleged employment simply is unsatisfactory. So, even if I had conducted my own assessment, I would have found that the documents did not prove the Claimant's claims that she worked at the accounting firm.

[61] Given these above considerations, the appeal is dismissed.

Janet Lew
Member, Appeal Division

METHOD OF PROCEEDING:	Questions and answers
APPEARANCES:	J. S., Appellant R. S., Representative for the Appellant A. Fricker, Representative for the Respondent