



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *Y. G. v. Minister of Employment and Social Development*, 2018 SST 418

Tribunal File Number: AD-16-1309

BETWEEN:

**Y. G.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: April 16, 2018

## DECISION AND REASONS

### DECISION

[1] The appeal is dismissed.

### OVERVIEW

[2] Y. G. (Claimant) applied for the allowance for survivors under the *Old Age Security Act* (OAS Act) in March 2014. The application was granted, and the Claimant was awarded 11 months of retroactive payments.<sup>1</sup> The Claimant contends that she was incapable of forming or expressing the intention to make an application prior to the date when she applied in 2014, so should be granted further retroactive payments. She appealed to this Tribunal regarding the decision by the Minister of Employment and Social Development regarding when payment of the benefit should start. The Tribunal's General Division dismissed the appeal. The Claimant's appeal from the General Division decision is dismissed because the General Division observed the principles of natural justice and made no errors in law or in fact.

### ISSUES

[3] Issue 1: Did the General Division err by not permitting the Claimant's representative to present arguments regarding discrimination?

[4] Issue 2: Did the General Division apply the correct legal test for incapacity?

[5] Issue 3: Was the General Division biased?

[6] Issue 4: Did the General Division err in weighing the evidence before it?

### ANALYSIS

[7] The *Department of Employment and Social Development Act* (DESD Act) governs the Tribunal's operation. It provides only three narrow grounds of appeal that can be considered: 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

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<sup>1</sup> The OAS Act provides for up to 11 months of retroactive payments in certain circumstances

capricious manner or without regard for the material before it.<sup>2</sup> Therefore, in order for the appeal to be allowed, the Claimant must establish that the General Division made at least one of these errors.

**Issue 1: Did the General Division err by not permitting the Claimant to present arguments of discrimination?**

[8] The Claimant argues that the General Division failed to observe the principles of natural justice because it did not hear any arguments related to her claim that the wording of Service Canada's Declaration of Incapacity form is discriminatory and holds claimants to a more difficult test than is required in the OAS Act. The Claimant's representative presented this argument in written submissions to the General Division. At the General Division hearing, the General Division Member explained that if the representative wished to pursue a discrimination claim under the *Canadian Charter of Rights and Freedoms*, specific procedures had to be followed and the hearing would have to be adjourned for this to occur. The representative stated that he was comfortable proceeding with the hearing without any consideration of this argument.<sup>3</sup>

[9] At the hearing, the Claimant's representative also argued that the Declaration of Incapacity form was misleading because the wording on page 2 of the form to define "incapacity" used such words as "extreme." The form also contains a strong warning regarding the consequences of making misleading statements. This made the Claimant's psychiatrist uncomfortable and unsure of how to complete the form. However, after discussing the matter with Service Canada, this doctor prepared a letter to accompany the form.<sup>4</sup> The Claimant's representative also acknowledged that the wording used in the form was not something that could be decided by the Tribunal.<sup>5</sup>

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

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<sup>2</sup> DESD Act, s. 58(1)

<sup>3</sup> Time 12:15 of the audio recording of General Division hearing, although the exact time may vary depending on what device is used to listen to the recording

<sup>4</sup> Time 53:15 of the recording

<sup>5</sup> Time 55:00 of the recording

a decision made by an impartial decision-maker based on the law and the facts. The General Division observed these principles.

[11] The Claimant's representative presented his arguments about discrimination in writing to the General Division. In addition, at the hearing, he was given the option to adjourn the hearing so that he could follow the procedure required to make a claim under the *Canadian Charter of Rights and Freedoms*. He chose not to do so.

[12] However, the General Division did consider his arguments. They were in his written submissions. The Federal Court of Appeal has decided that the Tribunal is presumed to have considered all of the evidence before it, including testimony and written material.<sup>6</sup> In addition, the General Division decision specifically refers to the Claimant's arguments, stating: "He submits that Dr. Donaldson's concerns about ongoing incapacity are attributed solely to the misleading language used by the [Minister] on its Declaration of Incapacity Form",<sup>7</sup> and "The Tribunal does not wish to speculate on how the word 'extreme' might have affected Dr. Donaldson's assessment."<sup>8</sup>

[13] From this, it is clear that the Claimant was not prevented from making arguments related to the alleged discriminatory language in the Declaration of Incapacity form. The General Division considered these arguments when making its decision. Therefore, there was no failure to observe the principles of natural justice in this regard.

## **Issue 2: Was the General Division biased?**

[14] Further, the Claimant argues that the General Division failed to observe a principle of natural justice because it was biased since it interpreted the evidence regarding power of attorney in the Minister's favour. The General Division decision states that the Claimant's representative had recently looked into being appointed the Claimant's power of attorney. The representative had been told by a lawyer that it was too late and that the Claimant did not have the capacity to execute the documents. The General Division did not rely on this evidence; it stated that the

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<sup>6</sup> *Simpson v. Canada (Attorney General)*, 2012 FCA 82

<sup>7</sup> General Division decision, paragraph 30

<sup>8</sup> *Ibid.*

Tribunal did not know what evidence the lawyer relied upon to make this determination.<sup>9</sup> This does not demonstrate any bias by the General Division. The appeal cannot succeed on this basis.

### **Issue 3: Did the General Division err in law?**

[15] The General Division also made no error regarding the legal test for incapacity under the OAS Act. The decision states that the incapacity provision of the OAS Act is an exception to the maximum retroactivity rules regarding OAS benefit payments if a claimant was incapable of forming or expressing an intention to apply for the benefit.<sup>10</sup> The relevant law is set out correctly:

The test for incapacity under section 28.1 of the OAS Act is precise and focused. It does not matter that a claimant may lack knowledge about her eligibility for a benefit (*Tatsiopoulos v. MSD* (December 17, 2004), CP 21976 (PAB)) or that she may lack the capacity to make, prepare, process or complete an application (*Canada (Attorney General) v. Danielson*, 2008 FCA 78) or that she may be incapable of dealing with the consequences of an application (*Canada (Attorney General) v. Poon*, 2009 FC 654).<sup>11</sup>

The Claimant's representative submits that the General Division applied the incorrect law to the facts before it. He referred to different court decisions. The General Division considered the decisions supporting the representative's arguments and explained that no weight was placed on those decisions because the facts therein were different from those involved in the matter at hand.<sup>12</sup>

[16] The General Division examined all of the evidence before it in detail and decided that Dr. Donaldson's Declaration of Incapacity form and accompanying letter did not provide a solid evidentiary foundation for a finding of incapacity.<sup>13</sup> It also could not equate the avoidance of filing income tax returns with an inability to form or express an intention to make an application<sup>14</sup> and found that the medical evidence suggested that the Claimant's mental health

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<sup>9</sup> *Ibid.*, paragraph 38

<sup>10</sup> *Ibid.*, paragraph 26

<sup>11</sup> *Ibid.*, paragraph 27

<sup>12</sup> *Ibid.*, paragraph 36 and 37

<sup>13</sup> *Ibid.*, paragraph 28

<sup>14</sup> *Ibid.*, paragraph 29

improved after 2011.<sup>15</sup> The General Division also considered that the Claimant continued to consent to medical treatment and sign documents, which it concluded was evidence of capacity.<sup>16</sup>

[17] The General Division made no error in law. While the Declaration of Incapacity form may be misleading or suggest that another standard be applied, the General Division did not hold the Claimant to a higher standard than required by the OAS Act and relevant case law.

**Issue 4: Did the General Division err in weighing the evidence before it?**

[18] Finally, the Claimant argues that the General Division erred in the manner in which it weighed the evidence; that it ignored medical evidence regarding the Claimant's incapacity; and that the evidence was clear that the Claimant was incapable of forming or expressing an intention to apply for the benefit in question.

[19] The General Division did not err in this regard. Its mandate is to receive the evidence from the parties, weigh it, apply the law to the facts, and make a decision. It is not for the Appeal Division to reweigh the evidence to reach a different conclusion.<sup>17</sup> The General Division decision contains a very detailed summary of the oral and written evidence that was before it. The General Division specifically considered Dr. Donaldson's evidence and explained why it was insufficient. It also considered Dr. Ocana's and Dr. Karim's evidence and explained that not much weight could be placed on this evidence because it related to a different legal test and because it referred to the Claimant's condition in 2003, which was not the relevant time for this appeal.

[20] The General Division also considered the Claimant's argument that the fact that she signed documents did not demonstrate intent, but simply acquiescence to instructions to do so. The General Division concluded that the signing of documents, along with other evidence of the

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, paragraphs 38 and 39

<sup>17</sup> *Simpson v. Canada (Attorney General)*, 2012 FCA 82

Claimant's activities, including her consent to treatment and her ability to perform household duties, evidenced capacity under the OAS Act.<sup>18</sup> This finding of fact is not erroneous.

[21] The General Division did not base its decision on any erroneous findings of fact. The appeal cannot succeed on the basis that the General Division weighed the evidence in a way that did not favour the Claimant.

## CONCLUSION

[22] I am sympathetic to the Claimant's difficult circumstances. However, the appeal must be dismissed because the General Division made no errors under the DESD Act.

Valerie Hazlett Parker  
Member, Appeal Division

HEARD ON:	April 4, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Tess Guay, Representative for the Appellant  Stéphanie Yung-Hing for the Respondent

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<sup>18</sup> General Division decision, paragraph 39