Citation: *IF v Minister of Employment and Social Development*, 2022 SST 1365

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	I. F.
Respondent:	Minister of Employment and Social Development
Representatives:	Emilee Fisher and Suzette Bernard

Decision under appeal:	General Division decision dated May 12, 2022 (GP-22-55)

Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	November 16, 2022
Hearing participants:	Appellant Respondent's representatives
Decision date:	November 29, 2022
File number:	AD-22-484

Decision

[1] The appeal is dismissed. The General Division did not make any errors.

Overview

[2] The Claimant, I. F., is seeking additional retroactive Old Age Security (OAS) pension payments.

[3] The Claimant was born in August 1944. She first applied for an OAS pension in December 2011.[1] Service Canada refused the application because the Claimant never complied with its request to provide information confirming her Canadian residence.

[4] In May 2019, the Claimant applied for the OAS pension again.[2] This time, Service Canada approved the application and granted the Claimant a full pension back to June 2018. Service Canada said that 11 months of retroactive payments were the maximum allowed under the law.

[5] The Claimant thought that she was entitled to more retroactive payments. However, she didn't ask Service Canada to reconsider its decision until May 12, 2021, nearly three years after the statutory 90-day deadline had elapsed. Service Canada refused to grant the Claimant an extension of time to request reconsideration.

[6] The Claimant appealed Service Canada's refusal to the Social Security Tribunal's General Division. The General Division decided that an oral hearing was unnecessary and, based on a review of the written record, dismissed the appeal. The General Division found that Service Canada, acting on behalf of the Minister, had acted in a judicial manner when it rejected the Claimant's request for reconsideration because of lateness.

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[1] See Claimant's initial application for an OAS pension date-stamped December 20, 2011, GD2-8.
[2] See Claimant's second application for an OAS pension date-stamped May 7, 2019, GD2-3.

[7] The Claimant is now asking the Appeal Division for permission to appeal the General Division's decision. She alleges that the General Division made the following errors:

- It ignored her request for an in-person hearing and decided her appeal by simply reviewing available documents;
- It attempted to communicate with her by telephone even though she explicitly informed Tribunal staff that she would only be in contact by email; and
- It issued its decision without giving her an adequate opportunity to hire a lawyer.

[8] I gave the Claimant permission to appeal because I thought she had an arguable case that the General Division had denied her right to be heard. I also saw an arguable case that the General Division improperly considered the Claimant's late reconsideration request. Earlier this month, I held a hearing by teleconference to discuss these questions in full.

Issue

[9] There are 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 error of fact.[3]

[10] To succeed, the Claimant has to show that the General Division made an error that falls into one or more of the above grounds of appeal. That means I have to answer the following questions:

[3] See *Department of Employment and Social Development Act*, section 58(1).

- Did the General Division overlook the Minister's failure to consider all required criteria when it refused the Claimant's late reconsideration request?

- Did the General Division deny the Claimant her opportunity to be heard by
  - disregarding her request for an in-person hearing;
  - ignoring her request to contact her only by email; and
  - issuing its decision before she had a chance to hire a lawyer?

Analysis

[11] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I have concluded that the General Division did not make any errors.

The General Division did not overlook any failure by the Minister to consider legislated criteria

[12] This is an issue that the Claimant did not explicitly raise among her reasons for appealing. However, it is consistent with her larger argument that the Minister ignored the circumstances that led her to delay her OAS pension application and, later, her reconsideration request.

[13] As the Generally Division rightly noted, a person who is dissatisfied with their OAS pension has 90 days to ask the Minister to reconsider it.[4]

[14] The Minister may allow a longer period to request reconsideration if she is satisfied that (i) there is a reasonable explanation for requesting a longer period and (ii) the person has demonstrated a continuing intention to request a reconsideration.[5]

[15] If the request for reconsideration is made more than 365 days after the person was notified of the decision, the Minister must also be satisfied that (iii) the request has a reasonable chance of success and (iv) no prejudice would be caused to any party by

[4] See section 27.1(1) of the *Old Age Security Act* (OASA).
[5] See section 29.1(1) of the *Old Age Security Act Regulations* (OASR).

allowing a longer period to make the request.[6] The Minister must consider all four criteria and be satisfied that all of them have been met.[7]

[16] In this case, no one disputed that the Claimant's request for reconsideration was more than 365 days late. The issue for the General Division was whether the Minister considered the Claimant's late request in the way required by the law.

[17] I granted the Claimant permission to appeal in part because I saw an arguable case that the General Division may have failed to notice that the Minister considered only three of the all four criteria required to assess whether an extension of time was warranted.

[18] However, having heard arguments from both parties, I am satisfied that the General Division held the Minister to the appropriate standard.

[19] In its decision, the General Division looked at whether the Minister considered the four criteria. It found that the Minister had accepted the Claimant's explanation for the delay and had recognized that she demonstrated a continuing intention to request reconsideration. However, as the General Division noted, the Minister found that the Claimant's underlying case had no reasonable chance of success because the *Old Age Security Act* imposes a strict 11-month limit on retroactive pension payments.

[20] The General Division was only required to determine whether the Minister considered the four criteria and whether she exercised her discretionary power to grant of refuse the Claimant's late request for reconsideration in a judicial manner.[8] It was not for the General Division to assess the substance of the Minister's deliberations or whether they led to a correct or reasonable result.

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[6] See section 29.1(3) of the OASR.
[7] See *Lazure v Canada (Attorney General)*, 2018 FC 467. This case is about a similar four-part test contained in the *Canada Pension Plan* and associated regulations, but its principle applies just as well to the OASA and OASR.
[8] As the General Division correctly noted, a discretionary power is not exercised in a judicial manner if it can be established that the decision-maker (i) acted in bad faith; (ii) acted for an improper purpose or motive; (iii) took into account an irrelevant factor; (iv) ignored a relevant factor; or (v) acted in a discriminatory manner. See *Canada (Attorney General) v Purcell,* [1996] 1 FCR 644 and *Canada (Attorney General) v Uppal,* 2008 FCA 388.

[21] When it came to the fourth question, the General Division wrote:

> Finally, the Minister considered the unfairness to the Minister or another party if the extension was allowed. The Minister concluded that there would be no unfairness if the extension was allowed as all the documents were still available to examine the application.[9]

However, when I looked at the worksheet that the Minister used to assess the Claimant's request for reconsideration, I saw that the final question ("Will an extension in time result in unfairness to the Minister or another party?") was not filled out.[10]

[22] I had speculated that, in light of this omission, the Minister and her staff might have neglected to consider the fourth criterion, as required by law. However, having thought about this matter further, I am not convinced that the Minister dropped the ball in this instance. And even if she did, I don't think it matters.

[23] First, a staffer's failure to complete the final question in a questionnaire does not necessarily mean that the question was ignored; it might well have been considered but left undocumented. Moreover, even if the staffer forgot to address the question or didn't think it was necessary to do so, it still wouldn't have made any difference. For reconsideration requests that arrive after a year, the Minister can extend the filing deadline only if she answers **all four** of the questions affirmatively. In this case, the Minister had already found that the Claimant's request had no reasonable chance of success. Even if the Minister had explicitly determined that her interests would not be prejudiced by granting the extension, she would still have had to decline the reconsideration request because one of the four criteria didn't go the Claimant's way.

[24] It is likely that the Minister's staffer recognized this hard truth and didn't think it worthwhile documenting her answer to the fourth question. It is just as likely that the General Division saw this logic and credited the Minister with having given due

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[9] See General Division decision, paragraph 17.
[10] See Service Canada's Late Reconsideration Request Extension of the 90-Day Time Limit Decision Document, completed by Isabelle B., Service Canada medical adjudicator, on October 26, 2021, GD2-33.

consideration to all four of the legislated criteria. I see no reason to interfere with the result.

The General Division did not deny the Claimant an opportunity to be heard

[25] The Claimant was surprised to receive a decision without an oral hearing. She discovered that the General Division had decided her appeal "on the record"—that is, based entirely on a review of the documents already on file. She alleges that the General Division disposed of her appeal without giving her a chance to make her best case.

[26] Now that I have considered this issue in depth, I am satisfied that the General Division gave the Claimant a full and fair hearing. I have come to this conclusion for the following reasons:

– The law allows the General Division to choose its own hearing format

[27] In her notice of appeal to the General Division, the Claimant stated that she wanted an in-person hearing over other options such as teleconference or videoconference.[11]

[28] On receiving the Minister's file on her claim, the Tribunal forwarded a copy of it to the Claimant under cover of a letter saying:

> Any additional documents that you want to send us in response to these documents must be submitted to us by **February 26, 2022**. Any responses to any additional documents must be provided to us by **March 17, 2022**.
>
> The Tribunal will assign this appeal to a Tribunal member (decision-maker) shortly after the dates mentioned above.
>
> The member will then:
>
> (a) issue a decision on the appeal based on the information on file; or

[11] See Claimant's notice of appeal to the General Division dated January 4, 2022, GD1-7.

(b) send parties a Notice of Hearing.[12]

[29] The law gives the General Division discretion to choose a suitable hearing format for each appeal. The General Division can make a decision based on the documents ad submission already filed or it can hold a further hearing, whether by written questions and answers, teleconference, videoconference, or personal appearance.[13]

[30] That said, the General Division must exercise its discretion in compliance with the rules of procedural fairness. The Supreme Court of Canada has pronounced on this issue in a case called *Baker*,[14] which held that that any decision affecting an individual's rights, privileges, or interests is sufficient to trigger a duty of fairness. However, the concept of procedural fairness is variable and must be assessed in the specific context of each case. *Baker* listed a number of factors that may be considered to determine what the duty of fairness requires in a particular case, including

- the importance of the decision to the affected individual;
- the legitimate expectations of the individual; and
- the procedural choices available to the decision-maker.

[31] I have no doubt that this case is very important to the Claimant, and I know that she expected to be given the fullest possible hearing. However, I also place great weight on the nature of the statutory scheme that governs the General Division. The Social Security Tribunal was designed to resolve disputes fairly and efficiently. To accomplish this, Parliament gave the General Division authority to determine how hearings are to be conducted. That authority should not be brought into question unless there is good reason to do so.[15]

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[12] See Tribunal's letter to the Claimant dated February 7, 2022.
[13] See *Social Security Tribunal Regulations*, sections 21 and 28.
[14] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.
[15] The Federal Court of Appeal has confirmed that a discretionary order may be set aside only if the decision-maker committed a "palpable and overriding" error. See *Horseman v Twinn, Electoral Officer for Horse Lake First Nation,* 2015 FCA 122 at paragraph 7.

[32] In this case, the General Division not only had the legal authority to proceed on the record, it also had good reasons for doing so:

- ***No further information was required to make the decision.*** The issues before the General Division turned entirely on a questions of law—whether the Minister considered the Claimant's late reconsideration request in a judicial manner and according to the four criteria required by the *Old Age Security Regulations* (OASR). It appears that every aspect of how the Minister arrived at her decision to deny that request was documented and made available to the General Division. I don't see what else the Claimant could have said or done to assist the General Division in determining whether the Minister had fulfilled her legal obligations.

- ***Credibility was not at issue.*** I know that the Claimant wanted to tell the General Division her side of the story in person. However, given the rather technical legal issues before it, whatever the Claimant had to say would have been irrelevant. The Claimant maintains that a Service Canada clerk gave her bad advice years ago about the extent of retroactive OAS pension payments. She says that she held off applying for her pension under the misapprehension that, whenever she finally did apply (having found or replaced her missing citizenship certificate), the government would pay her going back to her 65th birthday. She insists that, if she had known there was an 11-month limit to retroactive pension payments, she would have done things differently. But unfortunately for the Claimant, even if everything she says is true, it has no bearing on the main issue: whether the Minister properly considered her late reconsideration request.

- ***The Claimant's underlying case lacked legal merit.*** It's true that three of the four criteria favoured the Claimant. However, the one that didn't was doomed to fail whatever the Claimant said. Why? As the Minister found, the Claimant's case had no reasonable chance of success. First, the 11-month limit to retroactive pension payments is clearly set out in the legislation, and

> the Claimant does not fall under any exceptions. Second, there is nothing in the law that forces the Minister to admit to, or remedy, bad advice given by one of her employees or agents. It appears that the General Division recognized these realities and understood that it could not second-guess the Minister's assessment of the Claimant's underlying case. I am in no position to do so either.

[33] In a case called *Parchment*, the Federal Court affirmed the General Division's discretion under the OASR to choose a form of hearing, provided that it does not prevent the parties from fully presenting their cases.[16] Here, the Claimant explained the circumstances that led her to request reconsideration three years late in lengthy written submissions attached to her notice of appeal to the General Division. As discussed above, I don't see how the issues under appeal would have been further illuminated by oral submissions. For that reason, the General Division was justified in dispensing with an oral hearing and deciding the matter based on a documentary review.

[34] The Claimant might have been surprised to receive her decision without having had an oral hearing, but she shouldn't have been. The Tribunal's letter of February 7, 2022, clearly stated that the parties had up to five weeks to submit more information and that one of two things would happen next: the Claimant would either receive a notice of hearing or a "decision on the appeal based on the information on file." The General Division issued its decision 13 weeks later on May 12, 2022, but I don't see how, in doing so, it trampled on the Claimant's right to be heard or otherwise did her an injustice.

– The Tribunal's attempts to contact the Claimant by phone caused her no prejudice

[35] In her notice of appeal to the General Division, the Claimant explicitly asked the Tribunal to communicate with her by email only.[17] The Claimant said that she would be away until May 2022 and disconnecting her telephone service until then.

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[16] *Parchment v Canada (Attorney General)*, 2017 FC 354.
[17] See Claimant's notice of appeal to the General Division dated January 4, 2022, GD1.

[36] The Claimant had been led to understand that a navigator would help her with her appeal.[18] But when a navigator attempted to contact her, she did so by telephone, against the Claimant's stated preference.[19] The navigator left a message on the Claimant's voicemail but the Claimant never returned the call. The next thing that the Claimant heard from the Tribunal was the General Division's decision turning down her appeal three months later.

[37] I accept that, because the Tribunal disregarded her preferred mode of communication, the Claimant never received assistance from a navigator. Still, I don't see how this lapse amounted to a breach of natural justice.

[38] The fact remains that a navigator did attempt to contact the Claimant. The navigator apparently didn't notice the Claimant's request not to communicate by phone. But when the navigator called the listed number, it wasn't disconnected, as the Claimant had earlier indicated, but in service. Having left a message, the navigator can be forgiven for thinking that she connected with the Claimant.

[39] The Tribunal's use of the phone, rather than email, ultimately cost the Claimant an opportunity to avail herself of a navigator and the services that they provide. However, I don't think this rendered the proceedings unfair or tainted the result. Navigators are Tribunal staff who are specially trained to inform and guide unrepresented claimants through the appeal process. But their services are provided as a courtesy, not a right. There is nothing in the law that entitles claimants to be personally helped through the appeals process. Whether or not a navigator was available to her, the Claimant was still expected to familiarize herself with the rules and procedures of the Tribunal.

[40] As discussed, those rules and procedures included an option for the General Division to decide her appeal based on a review of the documents already filed. As discussed, the Claimant was informed in writing that this was a possibility. As discussed, the Claimant was offered an opportunity in writing to submit additional material within a five-week time frame. Given these circumstances, the Claimant cannot argue that she was misinformed about procedure or denied an opportunity to make her case, particularly when the key issues revolved entirely around points of law.

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[18] See Claimant's email to the Tribunal dated February 15, 2022.
[19] See telephone conversation log dated February 17, 2022.

– **The Claimant had an adequate opportunity to hire a lawyer**

[41] The Claimant argues that the General Division issued its decision before she had a chance to retain counsel.

[42] Again, I fail to merit in this argument. The Claimant applied for the OAS pension in May 2019 and soon after became aware that she was only entitled to 11 months of retroactive payments. From that point onward, it was open to her to hire legal representation, if she so wished, to make a case that the government had treated her unfairly. When she submitted her request for reconsideration, she did so more than a year late, thereby creating another legal obstacle in her quest for additional retroactive benefits. From that point forward, carrying on to her appeals at this Tribunal, the Claimant has continued to represent herself, knowing that she faced legal issues of some complexity.

[43] In her several emails to the General Division, the Claimant never mentioned her desire for a lawyer or requested a delay in the proceedings to allow her time to find one.[20] It was only when she got to the Appeal Division that she pleaded her lack of legal representation. However, having failed to previously raise it as an issue at the General Division, she cannot now credibly raise it at the Appeal Division.

Conclusion

[44] The General Division did not commit an error that falls within the permitted grounds of appeal. From what I can see, it proceeded fairly and applied the law correctly. Its decision stands.

[45] The appeal is therefore dismissed.

Member, Appeal Division

[20] See Claimant's emails dated February 15, 17, and 18, 2022,