

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20190522**

**Docket: A-253-18**

**Citation: 2019 FCA 157**

**CORAM: NEAR J.A.  
RENNIE J.A.  
LOCKE J.A.**

**BETWEEN:**

**JUDY SJOGREN**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Ottawa, Ontario, on May 15, 2019.

Judgment delivered at Ottawa, Ontario, on May 22, 2019.

**REASONS FOR JUDGMENT BY:**

**NEAR J.A.**

**CONCURRED IN BY:**

**RENNIE J.A.  
LOCKE J.A.**

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**REASONS FOR JUDGMENT**

**NEAR J.A.**

[1] The applicant, Ms. Judy Sjogren, applied for a disability pension under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 [CPP] after she sustained injuries to her spine in May 2009 while working as an X-ray technician. She stopped working at that time. She was 48 years old and had previously worked as a nurse. The Minister of Employment and Social Development (the Minister) denied her application both initially and on reconsideration, and the applicant appealed to the General Division of the Social Security Tribunal.

[2] At the applicant's request, her appeal before the General Division was heard by written questions and answers as permitted under section 21 of the *Social Security Tribunal Regulations*, SOR/2013-60. The applicant indicated that if an oral hearing was held, she reserved the right to call two witnesses: her family physician, Dr. Patricia Campbell, and her personal care worker. No oral hearing took place and she did not call these witnesses.

[3] The General Division dismissed the applicant's appeal on the basis that she did not suffer from a severe and prolonged disability as required under the *CPP*, indicating that "while the [applicant's] doctors have placed limits on her abilities to work the Tribunal is unable to ascertain that she is unable to work at all positions, including a sedentary position" (General Division Decision dated January 30, 2017 at para. 29, Respondent's Record, Vol. I, pp. 315-316). The applicant then sought leave to appeal the General Division's negative decision before the Appeal Division of the Social Security Tribunal.

[4] On November 2, 2017, the Appeal Division granted leave on the basis that the applicant had demonstrated an arguable case that the General Division committed a factual error "made in a perverse or capricious manner or without regard for the material before it" under paragraph 58(1)(c) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 [DESDA]. In particular, the Appeal Division found that it was arguable that the General Division erred when it concluded that there was "no medical evidence" to indicate that the applicant was unable to be substantially gainfully employed, despite a November 12, 2010 report from Dr. Campbell stating that the applicant "was not capable of any work" (Appeal Division Leave Decision dated November 2, 2017 at para. 12, Respondent's Record, Vol. I, pp. 227-232).

[5] Nevertheless, on May 31, 2018 the Appeal Division ultimately dismissed the applicant's appeal (Appeal Division decision dated May 31, 2018, Respondent's Record, Vol. I, p. 15).

It concluded that the General Division made its finding with express regard for Dr. Campbell's November 2010 report, and that the applicant impermissibly sought to re-weigh the evidence at the appeal stage. The Appeal Division also rejected the applicant's further claims that she was denied procedural fairness on the basis that the General Division did not contact or ask questions of the two witnesses she had proposed for an oral hearing, and that the General Division's reasons were deficient because it referred to her using the male pronoun "his" on one occasion. The Appeal Division found that "the [applicant] was given the opportunity to answer questions and make submissions on every fact or factor likely to affect the decision" (at p. 349).

[6] The applicant now seeks judicial review of the Appeal Division's decision before this Court. For most issues, the standard of review of Appeal Division decisions is reasonableness (*Garvey v. Canada (Attorney General)*, 2018 FCA 118 at para. 1; *Atkinson v. Canada (Attorney General)*, 2014 FCA 187 at paras. 24-32). However, the standard for questions of procedural fairness is correctness (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 43, [2009] 1 S.C.R. 339; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para. 54). The General Division owed procedural fairness to the applicant, and the task of the Appeal Division was to enforce that obligation. This Court will also enforce that obligation.

[7] In my view, the applicant has not met her burden of showing a reviewable error in the Appeal Division's decision, either with respect to the General Division's factual findings or the allegation of procedural unfairness and breach of natural justice.

[8] The General Division considered Dr. Campbell's November 2010 report and her finding that the applicant was "not capable of any type of work, due to permanent incapacity and ability to weight bear, or stand, or sit for long periods of time" (Dr. P. Campbell Letter dated November 12, 2010, Respondent's Record, Vol. II, p. 550). However, the General Division placed more weight on Dr. Campbell's subsequent report dated February 27, 2014, which noted that the applicant could not "return to any employment that involves standing [or] sitting for anything other than short periods of time, lifting more than 20 lbs" (Dr. P. Campbell Letter dated February 27, 2014, Respondent's Record, Vol. II, p. 649). The General Division found that the latter February 2014 report indicated an improvement in the applicant's condition and an ability to work in some capacity, particularly in light of evidence from August 2010 of the applicant's participation for eight weeks in a rehabilitation program and for four weeks in a work hardening program. As a result, the General Division concluded that "there is no medical evidence to indicate that [the applicant] was unable to be substantially gainfully employed" (at para. 29).

[9] The Appeal Division reviewed these findings and found that the General Division did not premise its decision on an erroneous finding of fact under paragraph 58(1)(c) of the *DESDA*. I agree, and reach this conclusion substantially for the same reasons given by the Appeal Division. The Appeal Division properly noted (at para. 22) that "although the General Division's statement that there was 'no medical evidence' suggests the General Division may not have considered Dr. Campbell's 2010 opinion, the rest of the decision shows that the General Division analyzed Dr. Campbell's evidence and determined that the [applicant] had capacity for work." Given this reconciliation of the General Division's findings, in my view, the Appeal Division's decision was reasonable.

[10] Further, the Appeal Division correctly concluded that the applicant was not denied her right to procedural fairness or natural justice under paragraph 58(1)(a) of the *DESDA*. The applicant reserved the right to call her two witnesses in the event of an oral hearing before the General Division. Since no oral hearing was held, there was no requirement for the General Division to hear from these witnesses. Moreover, the applicant did not raise the possibility of her proposed witnesses providing written testimony. Accordingly, I find that the Appeal Division correctly determined that the General Division acted fairly in the circumstances. I also agree with the Appeal Division that the singular misuse of a pronoun does not render the General Division's reasons inadequate where they are otherwise justifiable, transparent and intelligible as required under *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190.

[11] The Court acknowledges that the applicant has faced physical hardship since her accident and has sympathy for the struggles she has faced. However, for the above reasons I would dismiss the application. The respondent does not seek costs and I would award none.

"D. G. Near"

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J.A.

"I agree  
Donald J. Rennie J.A."

"I agree  
George R. Locke J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM A DECISION OF THE APPEAL DIVISION OF THE  
SOCIAL SECURITY TRIBUNAL OF CANADA DATED MAY 31, 2018  
(TRIBUNAL FILE NUMBER: AD-17-270)**

**DOCKET:** A-253-18

**STYLE OF CAUSE:** JUDY SJOGREN v.  
THE ATTORNEY GENERAL OF  
CANADA

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** MAY 15, 2019

**REASONS FOR JUDGMENT BY:** NEAR J.A.

**CONCURRED IN BY:** RENNIE J.A.  
LOCKE J.A.

**DATED:** MAY 22, 2019

**APPEARANCES:**

Judy Sjogren ON HER OWN BEHALF

Marcus Dirnberger FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Nathalie G. Drouin FOR THE RESPONDENT  
Deputy Attorney General of Canada