Citation: *CC v Minister of Employment and Social Development*, 2022 SST 317

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	C. C.
Representative:	Katie Conrad
Respondent:	Minister of Employment and Social Development

Decision under appeal:	General Division decision dated December 31, 2021 (GP-20-1513)

Tribunal member:	Neil Nawaz
Decision date:	April 29, 2022
File number:	AD-22-210

Decision

[1] Leave to appeal is refused. I see no basis for this appeal to go forward.

Overview

[2] The Claimant is a 56-year-old former Montessori teacher. She previously worked at a bank as an administrator and customer service representative.

[3] In January 2018, she slipped on ice and fractured her left ankle. She hasn't worked since. Despite undergoing a surgical fixation, followed by physiotherapy, she continues to complain of persistent leg pain.

[4] In May 2019, the Claimant applied for a Canada Pension Plan disability pension. She claimed that she could no longer work because ongoing pain, which interfered with her memory and concentration and prevented her from extended standing, walking, and sitting.

[5] The Minister refused the application because, in its view, the Claimant had not shown that she had a severe and prolonged disability.[1]

[6] The Claimant appealed the Minister's refusal to the Social Security Tribunal's General Division. The General Division dismissed the appeal because it found insufficient evidence that the Claimant was regularly incapable of a substantially gainful occupation. Among other factors, the General Division found that the Claimant had not made sufficient effort to pursue alternative employment that might have been within her capabilities.

[7] The Claimant is now requesting permission to appeal from the Appeal Division. She maintains that she is disabled and alleges that, in coming to its decision, the General Division made the following errors:

- It ignored medical evidence that she is unable to do sedentary work; and

[1] Coverage for CPP disability benefits is established by working and contributing to the CPP. In this case, the Claimant's CPP disability coverage will end on December 31, 2022.

- It failed to consider her background and personal characteristics.

[8] I have reviewed the General Division's decision and the Claimant's medical file. I have concluded that the Claimant's appeal does not have a reasonable chance of success.

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.[2]

[10] An appeal can proceed only if the Appeal Division first grants leave, or permission, to appeal.[3] At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.[4] This is a fairly easy test to meet, and it means that a claimant must present at least one arguable case.[5]

[11] I have to decide whether the Claimant has raised an arguable case that falls under one or more of the permitted grounds of appeal.

Analysis

[12] 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 Claimant does not have an arguable case.

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[2] *Department of Employment and Social Development Act* (DESDA), section 58(1).
[3] DESDA, sections 56(1) and 58(3).
[4] DESDA, section 58(2).
[5] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

There is no arguable case that the General Division ignored evidence

[13] The Claimant alleges that the General Division dismissed her appeal in the face of medical evidence showing she is no longer capable of work. In particular, she says that the General Division disregarded the slow and atypical pace of her recovery and ignored an October 2021 report from her pain specialist.

[14] I fail to see an arguable case on these points.

[15] One of the General Division's jobs is to make findings of fact. In doing so, it is presumed to have considered all the evidence before it.[6] In this case, I don't see an indication that the General Division disregarded any significant item of medical information on file.

[16] The Claimant listed reports from various treatment providers indicating that her recovery was slower than expected and her prognosis uncertain. The General Division mentioned every one of those reports in its decision. What's more, it accurately and fairly summarized those reports as follows:[7]

- In August 2019, Dr. Palombo, family physician, acknowledged that the Claimant's recovery was slow.
- In September 2019, Dr. Palombo reported that the Claimant would have a hard time going on modified duties at her job as a teacher.
- In April 2020, Dr. Palombo referred to the Claimant's hip, back, knee, and ankle issues as "chronic."
- In July 2019, Dr. Benmoftah, orthopedic surgeon, wrote that the Claimant had chronic pain and stiffness in her ankle. He expected the Claimant's condition to stay the same and be continuous.
- In August 2019, Dr. Ghavanini, neurologist, ruled out further surgery and advised the Claimant to see a pain specialist.

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[6] *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[7] General Division decision, paragraphs 31-37.

- In March 2020, Dr. Paleksic, physiatrist, noted that the Claimant's pain had spread from her ankle to her left knee, left hip, right knee, and right hip. She found that the Claimant's improvement had largely plateaued.
- In May 2021, Dr. Singer, orthopedic surgeon, recommended surgery to remove bone fragments that were causing the Claimant pain.

[17] As for the Claimant's pain specialist, the General Division squarely addressed her October 2021 report in its decision.[8] The General Division noted that Dr. Cuddihy attributed the Claimant's ongoing pain to a nerve injury. It relayed her finding that the Claimant's mobility issues would make it hard for her to return to work. It conveyed her uncertainty about whether the Claimant's upcoming surgery would work.

[18] The General Division was well aware that the Claimant never regained all the functionality she had before her injuries. However, having reviewed the evidence, it concluded that the Claimant had recovered to a point where she was still capable of some form of sedentary work. The Claimant may not agree with how the General Division chose to weigh the evidence, but it cannot claim that the General Division ignored that evidence. In the end, I find that the Claimant's submissions amount to an attempt to reargue evidence that she has already presented at the General Division. That is not something I can consider under the narrow grounds of appeal permitted by the legislation governing the Appeal Division.

There is no arguable case that the General Division misapplied *Villani*

[19] The Claimant suggests that the General Division misapplied an important case called *Villani*, which requires disability to be considered in a "real world" context, taking into account a claimant's employability, given their age, work experience, level of education, and language proficiency. The Claimant specifically alleges that the General Division erred when it found that, even with her impairments, she remains employable, despite her age and lack of transferrable skills.

[8] General Division decision, paragraph 37.

[20] Again, I do not see a case for this argument, which is essentially a request to reassess evidence. I note the words of the Federal Court of Appeal in *Villani*:

> [A]s long as the decision-maker applies the correct legal test for severity—that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) [of the CPP] he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation. The assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.[9]

This passage suggests that the General Division, in its role of fact finder, should be afforded a some leeway in how it assesses a claimant's background. It also implies that **whether** the test for disability was applied matters more than **how** it was applied. This approach happens to align with Federal Court of Appeal decisions[10] that prevent the Appeal Division from intervening on questions of mixed fact and law.

[21] In my view, the Claimant's submissions on this point amount to another bid to reargue the substance of her disability claim:

> The Tribunal Member found that [the Claimant] "can work in the real world". Respectfully, the analysis to get to this conclusion is flawed. [the Claimant] is 56 years old. She cannot do the two jobs that she's had in her adult life. Upon reading the decision, the Tribunal Member seemed to have concluded that [the Claimant] could do some type of work based solely on that fact that [the Claimant] could drive for an hour and could use a computer. These two skills hardly make [the Claimant] stand out from other able bodied candidates for potential employers.[11]

[22] This passage again dwells on the Claimant's physical and mental impairments, but it does not deny that the General Division considered her age, work experience, level of education, and language proficiency, which is all *Villani* required it to do. The General Division correctly cited *Villani* and analyzed in detail the likely impact, given her

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[9] See *Villani v Canada (Attorney General)*, 2001 FCA 248, paragraph 49.
[10] See *Quadir v Canada (Attorney General)*, 2018 FCA 21.
[11] Claimant's submissions, AD1-11.

impairments, of the Claimant's background and personal characteristics on her employment prospects:

> The Minister says the [Claimant's] personal characteristics may help her find a different job or retrain. They say her age may limit her job opportunities but her education, language skills, and work experience are positive factors.
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> The [Claimant's] representative says the [Claimant's] data entry diploma is outdated and her Montessori certification doesn't allow her to do other teaching jobs.
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> I agree with the Minister. The [Claimant] has transferable skills from her education and work history. She is 56 years old, which might negatively affect her ability to find other work. However, she speaks English fluently and is educated. She worked as a teacher for a long time and used her skills to teach at church on a computer. She also has skills from her experiences working at the bank.[12]

[23] It cannot be said that the General Division was unmindful of *Villani* or that it did not attempt to apply its chief principle. From that standpoint, the General Division fulfilled its duty under the law. In doing so, the General Division examined the Claimant's profile, finding that, even under her challenging circumstances, there were physically undemanding jobs that she had not yet tried. It is clear that the Claimant finds the General Division's analysis unreasonable, but that is not a ground of appeal permitted under the law.

Conclusion

[24] The Claimant has not identified any grounds of appeal that would have a reasonable chance of success on appeal. Thus, permission to appeal is refused.

Member, Appeal Division

[12] General Division decision, paragraphs 51–53.