



Citation: *JG v Minister of Employment and Social Development*, 2022 SST 969

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant (Claimant): J. G.
Representative: B. C.

Respondent: Minister of Employment and Social Development

Decision under appeal: General Division decision dated August 26, 2022
(GP-20-751)

Tribunal member: Kate Sellar

Decision date: October 3, 2022
File number: AD-22-645

Decision

[1] I am refusing leave (permission) to appeal. The appeal won't go ahead to the next step. These reasons explain why.

Overview

[2] J. G. (Claimant) worked in a warehouse. He had chemotherapy and a bone marrow transplant as part of his cancer treatment. After that treatment, he had a paralyzed diaphragm. This causes extreme shortness of breath and greatly limits the Claimant's physical abilities. After developing this condition, he returned to work in July 2017. He retired in October 2021.

[3] The Claimant started receiving a Canada Pension Plan (CPP) retirement pension in July 2015. He applied unsuccessfully for the CPP disability pension twice in 2017. He appealed the Minister's decision on the second application to this Tribunal. However, the General Division dismissed that appeal without a hearing because he applied for the disability pension more than 15 months after the start of his retirement pension.

[4] The Claimant applied for a CPP post-retirement disability benefit (PRDB) on January 11, 2019. The Minister of Employment and Social Development ("Minister") refused his application. The Claimant appealed the Minister's decision to this Tribunal.

[5] The General Division dismissed the Claimant's appeal, deciding that his disability wasn't severe within the meaning of the CPP on or before his 65th birthday. The General Division noted that the Claimant had functional limitations that affected his work, but he earned substantially gainful income working regularly and full time. The employer modified the job, but the employer was not benevolent.

[6] I must decide whether the General Division could have made an error under the *Department of Employment and Social Development Act (Act)* that would justify granting the Claimant leave (permission) to appeal.

[7] The Claimant has not shown that the General Division could have made an error. I cannot grant leave to appeal. The appeal won't go ahead to the next step.

Issue

[8] Could the General Division have made an important error of fact about the Claimant's work?

Analysis

Reviewing General Division decisions

[9] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full. Instead, I reviewed the documents in the appeal file to decide whether the General Division may have made any errors.

[10] That review is based on the wording of the Act, which sets out the "grounds of appeal." The grounds of appeal are the reasons for the appeal. To grant leave to appeal, I must find that it is arguable that the General Division made at least one of the following errors:

- It acted unfairly.
- It failed to decide an issue that it should have, or decided an issue that it should not have.
- It based its decision on an important error regarding the facts in the file.
- It misinterpreted or misapplied the law.¹

[11] An error of fact has to be important enough that it could affect the outcome of a decision. An error of fact can happen because the General Division ignored evidence or reached a conclusion that is inconsistent with the evidence.²

[12] Following the law in this area requires assuming that the General Division considered all of the evidence, even if the General Division doesn't mention it in the

¹ See section 58(1) of the *Department of Employment and Social Development Act (Act)*.

² For more detail about errors of fact, see *Walls v Canada (Attorney General)*, 2022 FCA 47.

decision.³ The Claimant can overcome that assumption by showing that the evidence was important enough that General Division needed to discuss it.⁴

[13] At the leave to appeal stage, a claimant must show that the appeal has a reasonable chance of success.⁵ To do this, a claimant needs to show only that there is some arguable ground on which the appeal might succeed.⁶

No argument for an error of fact

[14] The Claimant does not have any argument with a reasonable chance of success on appeal about an error of fact. The General Division considered the facts the Claimant provided about his work, but when the General Division applied those facts to the requirements in the law, the Claimant was not eligible for the PRDP.

[15] The Claimant argues that the General Division made errors of fact:

- By finding that he worked two jobs when he didn't.
- By ignoring evidence about: (i) how serious his functional limitations are currently in terms of cognitive and physical impairments (including depression symptoms and mood changes), and (ii) difficulty with everyday activities like putting on socks and bathing.
- By misunderstanding how difficult it was for him to cope with working, and ignoring that he worked because he had no choice financially

– The number of jobs the Claimant worked

[16] There is no argument that the General Division made an error of fact about the Claimant working two jobs. The General Division doesn't seem to have actually decided that the Claimant worked two jobs. Instead, the General Division explained that more

³ See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

⁴ See *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498.

⁵ See section 58(2) of the Act.

⁶ The Federal Court of Appeal confirmed this in a case called *Fancy v Canada (Attorney General)*, 2010 FCA 63.

than one doctor stated that the Claimant was working two jobs.⁷ The General Division noted that the Claimant explained that he exaggerated his ability with his doctors because he didn't want to slow down. He wanted people to know that he was trying to get better. The General Division seems to have concluded that the Claimant worked at the warehouse and "seems to have done upholstery work too."⁸

[17] Even if the General Division made an error about how much (if any) upholstery work the Claimant completed, it isn't an important error that could change the outcome of the Claimant's appeal. The General Division's reasons really focus on how reliable the Claimant was in working full time at the warehouse and the fact that he earned a living doing that work.⁹

– **Evidence about the Claimant's functional limitations**

[18] There's no argument with a reasonable chance of success about ignoring evidence.

[19] The General Division had to focus on the Claimant's disability on or before May 24, 2020 (when the Claimant turned 65).

[20] The General Division explained that Service Canada uses his years of contributions to the CPP to calculate his coverage period. The coverage period cannot be later than the Claimant's 65th birthday because Service Canada cannot pay the PRDB to a claimant after their 65th birthday.¹⁰

[21] Focusing on the Claimant's medical situation currently would not change the outcome of the appeal. The Claimant's functional limitations now are not relevant. The General Division cannot find a claimant eligible for the PRDP based on a claimant's medical condition after their 65th birthday.

⁷ See paragraph 46 in the General Division decision.

⁸ See paragraph 51 in the General Division decision.

⁹ See paragraphs 46 to 48 in the General Division decision.

¹⁰ See sections 44(4) and section 70.02(b) of the *Canada Pension Plan*; and paragraph 8 in the General Division decision.

– **Evidence about how difficult it was to work and why the Claimant worked**

[22] The General Division described how difficult it was for the Claimant to continue working, and that he did it because financially he had no choice.¹¹ The General Division didn't ignore or misunderstand this evidence.

[23] The problem is that acknowledging this evidence doesn't provide a path to eligibility for the Claimant. The General Division had to consider what the work means in terms of whether the Claimant was incapable regularly of pursuing any substantially gainful work.¹²

[24] Given what the law says about who qualifies for the PRDP, the financial reasons why the Claimant worked, and the hardship he faced while working don't help decide his eligibility for PRDP.¹³

General Division did not ignore or misunderstand evidence

[25] I have reviewed the documents and the recording of the General Division hearing in this appeal. I don't see any argument that the General Division ignored or misunderstood any important evidence.¹⁴

[26] To be eligible for the PRBD, the Claimant needed to show that he had a severe disability within the meaning of the CPP. That means showing that he was incapable regularly of pursuing any substantially gainful work. The Claimant made extraordinary efforts to earn a living despite his disability. The money he earned was substantially gainful. He was reliable.

[27] The General Division took a close look at whether the work the Claimant did was benevolent. That means that the General Division considered whether the Claimant was still incapable regularly of pursuing any work in a competitive workplace given:

¹¹ See paragraphs 24 to 27, 44, 50, and 52 in the General Division decision.

¹² See section 42(2) of the *Canada Pension Plan* for the definition of a severe disability.

¹³ The General Division did consider whether the work the Claimant did was for a benevolent employer, which was important.

¹⁴ This review is consistent with what the Federal Court talked about in *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

- Any modifications to the work the employer made for the Claimant
- The Claimant's performance or output compared to other employees.

[28] .The General Division considered all of the Claimant's evidence and decided that the work was modified to a degree, but not benevolent.¹⁵ I don't see an argument here that the General Division ignored or misunderstood the evidence about this important issue.

Conclusion

[29] I am refusing permission to appeal. This means that the appeal won't go forward to the next step.

Kate Sellar
Member, Appeal Division

¹⁵ See paragraphs 41 to 49 in the General Division decision.