



Citation: *FA v Minister of Employment and Social Development*, 2021 SST 595

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

**Applicant:** F. A.  
**Representative:** Connie Oliverio

**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** General Division decision dated August 6, 2021  
(GP-21-624)

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**Tribunal member:** Janet Lew

**Decision date:** October 18, 2021

**File number:** AD-21-329

## Decision

[1] Leave (permission) to appeal is refused because the appeal does not have a reasonable chance of success. The appeal will not be going ahead.

## Overview

[2] The Applicant, F. A. (Claimant), is appealing the General Division decision. The General Division found that the Claimant did not have a severe and prolonged disability by the end of his minimum qualifying period on December 31, 2002. Therefore, it concluded that he was not entitled to a Canada Pension Plan disability pension.

[3] The Claimant argues that the General Division based its decision on two important errors of fact. The Claimant argues that the General Division failed to consider the psychological component of his disability. He also argues that the General Division erred when it found that he had not attempted any retraining program.

[4] I have to decide whether the appeal has a reasonable chance of success.<sup>1</sup> Having a reasonable chance of success is the same thing as having an arguable case.<sup>2</sup>

[5] I am not satisfied that there is an arguable case. The application is refused and the appeal will not be going ahead.

## Issues

[6] The issues are as follows:

- a) Is there an arguable case that the General Division failed to consider the Claimant's psychological disability?
- b) Is there an arguable case that the General Division made a factual error about whether the Claimant did not attempt retraining?

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<sup>1</sup> Under section 58(2) of the *Department of Employment and Social Development Act*, I am required to refuse permission if I am satisfied, "that the appeal has no reasonable chance of success."

<sup>2</sup> See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[7] The Claimant argues that the evidence shows that he was severely disabled by December 31, 2002. He asks me to reconsider the medical evidence and the cumulative impact of his disabilities on his capacity regularly of pursuing a substantially gainful occupation. He also asks me to consider his personal characteristics. But, I cannot consider these arguments because the Appeal Division does not have any authority to conduct reassessments.

## **Analysis**

[8] The Appeal Division must be satisfied that the appeal has a reasonable chance of success before it gives the claimant permission to go ahead with their appeal. A reasonable chance of success exists if there is a certain type of error.<sup>3</sup> These errors are about whether the General Division:

- (a) Failed to make sure that the process was fair;
- (b) Failed to decide an issue that it should have decided, or decided an issue that it should not have decided;
- (c) Made an error of law; or
- (d) Based its decision on an important factual error. (The error has to be perverse, capricious or without regard for the evidence before it.)

[9] Once an applicant gets permission from the Appeal Division, they move to the actual appeal. There, the Appeal Division decides whether the General Division made an error and, if so, decides how to fix that error.

### **Is there an arguable case that the General Division failed to consider the Claimant's psychological disability?**

[10] The Claimant argues that the General Division made factual errors at paragraphs 31 and 32 of its decision. The General Division wrote:

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<sup>3</sup> See section 58(1) of the *Department of Employment and Social Development Act*.

[31] Dr. Petrov's clinical notes indicated that in 2002 he was unable to use his left arm or return to his previous job. He recommended he retrain. In fact, Dr. Petrov told the WSIB he should be retrained in March 2002.<sup>4</sup> This recommendation is significant as it shows a capacity to work.<sup>5</sup>

[32] This opinion is echoed by the orthopaedic surgeon, Dr. Vincent, who allowed that the weakness of the left shoulder would remain, and recommended retraining for a more sedentary job through the WSIB<sup>6</sup> ...

[11] The Claimant argues that, by relying on the opinions of his family doctor and an orthopaedic surgeon, the General Division failed to consider his psychological disability when it was determining whether he was capable of being retrained. Because of this, he says the General Division erred when it concluded that he could be retrained.

[12] The Claimant argues that his psychological disability was more disabling than his physical injuries. He also says that his psychological disability "interfered significantly in his ability to re train or succeed in retraining."<sup>7</sup>

[13] In fact, the General Division was fully aware of and addressed the Claimant's arguments that his psychological disabilities significantly interfered with his ability to retrain.

[14] The General Division reviewed the psychiatrist's medical-legal report. The General Division noted that the psychiatrist diagnosed the claimant with post-traumatic stress disorder with significant psychosocial problems, and that the Claimant had not responded to any treatment. The psychiatrist recommended that the Claimant try new medications, along with continuing his current ones.

[15] The General Division noted the psychiatrist's opinion also that the Claimant would be unable to return to work in the foreseeable future and that the Claimant remained totally disabled due to the severity and chronicity of his medical and

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<sup>4</sup> The General Division cited the WSIB form dated March 7, 2002, by Dr. Petrov, at GD2-535.

<sup>5</sup> The General Division cited the case of *S.M.R. v Canada (Attorney General)*, [2013] F.C.J. No. 689, 2013 FCA 158, which states that the capacity to work is indicated by the performance of part-time work, modified activities, sedentary occupations and school attendance.

<sup>6</sup> The General Division cited GD2-594 December 12, 2002 and GD2-605.

<sup>7</sup> See Claimant's Application to the Appeal Division, filed on October 4, 2021, at AD1-3.

psychiatric conditions. The General Division also noted that the psychiatrist was of the opinion that the Claimant was not re-trainable.

[16] The General Division accepted that the Claimant had mental health issues. But, it placed little weight on the psychiatrist's medical opinions. To begin with, the psychiatrist was "not ...a consistent treating physician"<sup>8</sup> during the relevant timeframe; for many years after the end of the minimum qualifying period, he rarely saw the Claimant. The General Division wrote:

After November 2002, when presumably [the Claimant] was in a serious state with [post-traumatic stress disorder] and 'significant psychosocial problems', he did not see [the psychiatrist] again for a full year, and did not consult with any other psychiatrist or psychologist in that time. Then again, after November 2003, he saw him a year later in December 2004. He did not see him at all in 2005 or 2006 or the majority of 2007 until August 2007. After November 2007, there was a missed period of three years until he saw him four times in 2010.<sup>9</sup>

[17] The General Division acknowledged that the psychiatrist monitored the Claimant's medications and provided some supportive therapy. But, the General Division found that the psychiatrist did not provide ongoing counselling or treatment for post-traumatic stress disorder or for any significant mental health conditions.

[18] The General Division noted that the family doctor deferred to the psychiatrist to comment on specific medications and treatments. The General Division understood from this that (i) the family doctor was unfamiliar with the Claimant's treatment for his mental health issues and (ii) the family doctor did not prescribe any medications to treat the Claimant's mental health issues.

[19] The General Division concluded that, as the Claimant did not see the psychiatrist for the years 2004 to 2007 and between 2007 and 2010, it was unlikely that the Claimant required any medications or treatments for his mental health issues during these timeframes.

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<sup>8</sup> See General Division decision, at para. 25.

<sup>9</sup> See General Division decision, at para. 24.

[20] The General Division rejected the Claimant's explanation for the occasional visits to the psychiatrist. The Claimant explained that the psychiatrist was away overseas for half the year. The General Division found that, if the Claimant were in such a serious mental health state, surely his family doctor would have referred him to another psychiatrist, and a psychologist who could treat the Claimant on a regular basis.

[21] The psychiatrist was of the opinion that the Claimant was not re-trainable. The General Division rejected this particular opinion from the psychiatrist because it was evident that the psychiatrist was unaware that the Claimant had in fact already successfully received five years of retraining. The General Division found that the Claimant had completed upgrading and had received a college diploma.

[22] Although the Claimant argues that the General Division failed to consider his psychological disability as barriers to retraining, it is clear that the General Division considered the Claimant's mental health issues and their impact on his ability to retrain. In any event, the Claimant's psychological health was a moot issue, as the General Division found, since the Claimant was able to retrain.

[23] Essentially, the Claimant is arguing that the General Division should have accepted and placed considerable weight on the opinion of the psychiatrist. However, as the Federal Court of Appeal has consistently held, weighing evidence is the province of the trier of fact.<sup>10</sup> I see no basis to interfere with the findings of the General Division.

[24] I am not satisfied that there is an arguable case that the General Division failed to consider the Claimant's psychological disability when it assessed his capacity for retraining.

**Is there an arguable case that the General Division made a factual error about whether the Claimant did not attempt retraining?**

[25] The Claimant argues that the General Division concluded that the Claimant did not attempt any retraining program. The Claimant argues that this is inaccurate, as he attempted a Workplace Safety and Insurance Board-sponsored retraining program that

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<sup>10</sup> See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

involved upgrading his English skills. The Claimant says that the retraining was lengthy but ultimately unsuccessful because he remained incapable regularly of pursuing any substantially gainful occupation. He says he remained incapable because of a combination of physical and psychological disabilities and lack of confidence.

[26] This misstates the General Division's findings. In fact, the General Division accepted the fact that the Claimant underwent WSIB-sponsored training. It found that the Claimant attended school for five years. The General Division noted the following:

- Initially, the Claimant started at Career Essentials for upgrading, to allow him to get into a construction engineering technician diploma programme at the George Brown College.<sup>11</sup> The Claimant needed to upgrade his computer skills. He received upgrading for his computer schools. After the Claimant upgraded his computer skills, the college accepted him.<sup>12</sup>
- WSIB provided the Claimant with a math tutor, and he took a math course in the summer 2005.<sup>13</sup>
- The Claimant received further computer upgrading from June to November 2007.<sup>14</sup>
- The Claimant completed the construction engineering technician diploma in April 2007<sup>15</sup>
- After finishing the diploma program, the Claimant went on a job search-training program, from April 30, 2007 to May 25, 2007.<sup>16</sup>

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<sup>11</sup> See General Division decision, at para. 37.

<sup>12</sup> See General Division decision, at para. 39.

<sup>13</sup> See General Division decision, at para. 41.

<sup>14</sup> See General Division decision, at para. 40, citing service completion report of November 9, 2007.

<sup>15</sup> See General Division decision, at para. 41.

<sup>16</sup> See General Division decision, at para. 41.

- In May 2007, the Claimant wrote to his caseworker, claiming that he required further training in computers. He had further computer training from June 4 to November 2, 2007.<sup>17</sup>

[27] The General Division found that the Claimant proved that he was capable of retraining at the Career Essentials for a year of upgrading, and for two years at George Brown College, from which he received a construction engineering technician diploma. The General Division found that the Claimant also received further training in math and computer upgrading. The General Division wrote that, “The Claimant was successful in completing years of upgrading and a college diploma, with high marks and no absences.”

[28] Given these findings, I see no basis in the Claimant’s arguments that the General Division found that he did not attempt any retraining program. I am not satisfied that there is an arguable ground that the General Division made a factual error that he did not attempt any retraining.

## **Conclusion**

[29] Permission to appeal is refused. This means that the appeal will not go ahead.

Janet Lew  
Member, Appeal Division

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<sup>17</sup> See General Division decision, at paras. 43 and 44.