Citation: *MC v Minister of Employment and Social Development*, 2022 SST 20

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. C.
Respondent:	Minister of Employment and Social Development

Decision under appeal:	General Division decision dated October 1, 2021 (GP-21-271)

Tribunal member:	Kate Sellar
Decision date:	January 14, 2022
File number:	AD-22-3

Decision

[1] I am refusing leave (permission) to appeal. The appeal will not proceed. These reasons explain why.

Overview

[2] M. C. (Claimant) worked full-time in a factory. He says that he was no longer able to work as of September 2016, due to chronic severe back pain. He also reported leg pain and pain in the back of his head. He explains that his pain first started about 20 years ago when he was driving a taxi. He says his severe daily pain stops him from sitting, standing, bending, or lifting heavy items.

[3] The Claimant applied for a Canada Pension Plan (CPP) disability pension on March 17, 2020.The Minister of Employment and Social Development ("Minister") refused his application. The Claimant appealed the Minister's decision to this Tribunal.

[4] The General Division decided that the Claimant was not eligible for the disability pension. He needed to show that his disability was severe and prolonged on or before December 31, 2002. The General Division decided that the disability was not severe because his functional limitations did not affect his ability to work by December 31, 2002.

[5] The Claimant asks for leave to appeal the General Division's decision.

[6] I must decide whether it is arguable that the General Division made an error that would justify granting the Claimant leave to appeal.

[7] The Claimant has not raised an arguable case for an error by the General Division.

[8] I am refusing leave to appeal. The appeal will not go ahead.

Preliminary Matters

[9] The Claimant provided me with a letter from his doctor dated November 29, 2021.[1] The letter says that he has been having back pain for more than 20 years.

[10] Most of the time, the Appeal Division does not accept new evidence in support of an application for leave to appeal.[2] The Appeal Division's task is to decide whether the General Division made errors. New evidence does not help the Appeal Division in that task, unless, for example, the new evidence helps the Appeal Division to understand how the General Division might have failed to provide a fair process to the Claimant.

[11] I will not consider the new medical evidence from the Claimant's doctor about his disability in support of his appeal. I will focus instead on the arguments about whether the General Division might have made an error.

[12] If claimants wish to rely on new evidence, they can make an application to rescind or amend (cancel or change) the General Division decision.[3]

Issue

[13] The issue in this case is as follows:

- Can it be argued that the General Division made an error of fact about the timing of the Claimant's back pain that would justify granting leave to appeal?

Analysis

[14] First, I will describe my role at the Appeal Division in terms of reviewing General Division decisions. Second, I will explain how I have reached the conclusion that the

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[1] See AD1-10.
[2] The Federal Court of Appeal explained this in a case called *Parchment v Canada (Attorney General)*, 2017 FC 354.
[3] See section 66 of the *Department of Employment and Social Development Act* (Act).

Claimant has not raised an arguable case that the General Division made an error of fact.

Reviewing General Division decisions

[15] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full. Instead, I reviewed the Claimant's arguments and the General Division's decision to decide whether the General Division may have made any errors.

[16] That review is based on the wording of the *Department of Employment and Social Development Act* (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.[4]

[17] 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]

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[4] See section 58(1) of the Act.
[5] See section 58(2) of the Act.
[6] The Federal Court of Appeal explained this idea in a case called *Fancy v Canada (Attorney General)*, 2010 FCA 63.

The Claimant did not raise an arguable case for an error of fact about the timing of his back pain

[18] The Claimant has not raised an arguable case for an error of fact by the General Division. The General Division did not ignore or misunderstand the Claimant's evidence about his history with back pain.

[19] An error of fact needs to be important enough that it could affect the decision.[7] An error of fact arises either when the General Division ignores or misunderstands a fact in an important way.[8]

[20] In this case, the General Division decided that the Claimant was not entitled to a disability pension because his disability was not severe on or before December 31, 2002.[9] A disability is severe if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.[10] The focus is on functional limitations that affect a claimant's ability to work, not just diagnoses.

[21] The General Division found that the Claimant's functional limitations did not stop him from working until many years after 2002. In 2002, the Claimant was driving a taxi in Canada, and then he moved to Pakistan and worked there from 2002 to 2014 in a shop. This job was not so hard on his back and he worked full-time. When he returned to Canada, he did much heavier work in a factory. He developed limitations that affected his ability to work.

[22] The Claimant argues that the General Division made an error of fact.[11] He confirms that his back pain started when he was driving a taxi, and that he did not see a doctor at the time because he was working long hours. The pain got worse years later in 2015, but he does not have medical records from when the pain first started. He had to

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[7] Section 58(1)(c) of the Act requires that the error of fact must be one that the General Division based its decision on.
[8] Section 58(1)(c) of the Act requires that the error of fact arise either from ignoring evidence or making the finding of fact in a perverse or capricious way.
[9] The Claimant's minimum qualifying period (or MQP) ends on December 31, 2002. We calculate that date based on his contributions to the Canada Pension Plan.
[10] See section 42(2) of the *Canada Pension Plan* (CPP).
[11] See AD1-9.

stop working in September 2016. He argues that his testimony about when the pain started is important. He says that testimony is all that is available since there is no medical test that he can do today to show when the pain first started.

[23] In my view, it is not arguable that the General Division made an error of fact. The General Division did not ignore or misunderstand the Claimant's testimony about the timing of his back pain.[12]

[24] At the hearing, the Claimant explained that he had back pain when he was driving the taxi. When his pain worsened years later at the factory, this was not a brand-new issue. His description of the way the pain affected him when he was working at the factory was different from the way the pain affected him many years before when he drove the taxi. He had medical tests and a diagnosis. The pain was worse and had a greater impact on his functioning after working the factory.[13]

[25] The General Division reviewed in detail both the Claimant's testimony and the medical evidence to decide whether the Claimant proved that his disability was severe on or before December 31, 2002.[14] The General Division noted that the medical evidence showed that the disability started after working in the factory.[15] The General Division also noted that the Claimant testified that he did not seek treatment for his back when he was driving the taxi because he knew that if he left that work, he would feel better.[16]

[26] It is not arguable that the General Division misunderstood the facts about the Claimant's pain or his work history driving the taxi, doing lighter work in Pakistan, and then doing heavier work again in Canada. The problem the Claimant points to is really

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[12] See General Division decision, especially at paragraph 28.
[13] The recording of the General Division decision contains the Claimant's testimony. He spoke about his pain and the affect it had on his ability to work from about the 31:00 minute mark to about the 53:00 minute mark.
[14] See the General Division decision at paragraphs 17 to 29.
[15] See paragraphs 25 and 28 of the General Division decision, for example.
[16] See paragraph 26 of the General Division decision.

that when the General Division applied those facts to the law, the result was not in the Claimant's favour.

[27] There is no arguable case that the General Division misunderstood the evidence. The Claimant didn't have medical evidence that stated he was incapable regularly of performing any substantially gainful occupation in 2002. He didn't see a doctor at the time. He moved back to Pakistan and worked full-time in a lighter position.

[28] I reviewed the Claimant's appeal documents and the recording of the hearing. I am satisfied that the General Division did not ignore or misunderstand the evidence in any way that could have affected the result for the Claimant.[17]

[29] A final note. The Claimant was confused during the General Division hearing about exactly which benefits or income help he has had since he stopped working at the factory. It may be that he received Employment Insurance (EI) regular benefits for a time. It may be that the provincial government clawed back his Ontario Works benefits (or that he had an overpayment). It may be that the Claimant is still receiving Ontario Works benefits. He testified that his doctor advised him to stop working, and that someone advised him to access food banks.

[30] It is also unclear whether the Claimant has ever had any advice about (or whether he has ever applied for) social assistance for people with disabilities in Ontario through the Ontario Disability Support Program. That program is not the same as the CPP disability pension.

Conclusion

[31] I am refusing permission to appeal. This means that the appeal will not go ahead.

Kate Sellar
Member, Appeal Division

[17] This kind of review is consistent with the expectation the Federal Court set out in *Karadeolian v. Canada (Attorney General)*, 2016 FC 615.