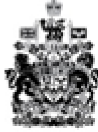

Citation: *JM v Minister of Employment and Social Development*, 2022 SST 36

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	J. M.
Respondent:	Minister of Employment and Social Development
Decision under appeal:	General Division decision dated December 14, 2021 (GP-20-1281)
Tribunal member:	Kate Sellar
Decision date:	January 31, 2022
File number:	AD-22-50

Decision

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

Overview

[2] J. M. (Claimant) has a mechanical engineering degree from a Chinese university. She immigrated to Canada in 2003.

[3] The Claimant worked part-time producing technical drawings and plans from 2005 until she was laid off in 2009. She was unemployed from 2010 to 2013.

[4] The Claimant worked in the service industry after 2013. She worked part-time as a gas station cashier for several months in 2014. She then worked full-time at a fast food restaurant from late 2016 until July 2018. She also worked part-time as a cashier at a gas station from March to July 2018. She stopped working because she had difficulty due to back pain. In 2019, the Claimant started a business with her husband selling food at a farmer's market. They continue to run this business together.

[5] The Claimant applied for a CPP disability pension on August 12, 2019. The Minister of Employment and Social Development (Minister) refused her application. The Claimant appealed to this Tribunal.

[6] The General Division dismissed the Claimant's appeal. The Claimant did not show that she had a severe disability on or before December 31, 2011. The Claimant asks for leave to appeal the General Division's decision.

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

[8] It is not arguable that the General Division made an error of fact in the Claimant's appeal. The appeal will not go ahead.

Preliminary matter: new evidence

[9] The Claimant provided evidence about her medical situation, including some pictures of medication from China and a picture of a scar on her back form the surgery she had in 1996.[1]

[10] Most of the time, the Appeal Division does not accept new evidence in support of an application for leave to appeal.[2]

[11] 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.

[12] I will not consider the new evidence the Claimant provided. I will focus instead on the arguments about whether the General Division might have made an error.

Issue

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

- Is there an arguable case that the General Division made an error of fact by ignoring or misunderstanding the Claimant's evidence about her back pain?

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 it is not arguable that the General Division made an error of fact.

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[1] See AD1-1, and AD1-5 to 11.
[2] The Federal Court of Appeal explained this in a case called *Parchment v Canada (Attorney General)*, 2017 FC 354.

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.[3]

[17] At the leave to appeal stage, a claimant must show that the appeal has a reasonable chance of success.[4] To do this, a claimant needs to show only that there is some arguable ground on which the appeal might succeed.[5]

No Possible Error of Fact

[18] The Claimant has not raised an argument for a possible error of fact by the General Division. The General Division did not ignore any of the Claimant's evidence. The General Division did not misunderstand her evidence either. The Claimant was not entitled to the disability pension because she did not have medical evidence about the

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

main medical condition (her lower back pain) that would help the General Division to conclude that she had a severe disability during her minimum qualifying period (MQP).

– **The General Division's approach**

[19] The General Division reviewed the available evidence and decided that the Claimant's disability was not severe on or before December 31, 2011.[6] A person with a severe disability is incapable regularly of pursuing any substantially gainful work.[7]

[20] The General Division reviewed the medical evidence.[8] The General Division noted that there was a lack of medical evidence from the MQP. At the hearing, the Claimant explained that she was only taking over-the-counter medication at that time and may not have been regularly seeing a doctor.[9]

[21] The General Division acknowledged that here was some medical evidence from the Claimant's doctor about a mental health condition, but it began several years after the end of the Claimant's MQP. The General Division explained clearly that the focus needed to be on medical condition on or before December 31, 2011.[10]

[22] The General Division also considered the Claimant's own testimony and the testimony from her husband, noting that she said she had difficulty with standing and sitting too long and with concentration. She had trouble doing household chores and felt dizzy. The Claimant's husband also explained that she was depressed and had trouble taking care of herself.[11]

[6] Based on her contributions to the Canada Pension Plan, the Claimant had to show that her disability was severe and prolonged on or before December 31, 2011, when her minimum qualifying period (MQP) ended.
[7] See section 42(2) of the *Canada Pension Plan*.
[8] See paragraph 26 of the General Division decision.
[9] See paragraph 28 of the General Division decision.
[10] See paragraph 29 of the General Division decision.
[11] See paragraphs 23 and 24 of the General Division decision.

– **The Claimant's arguments about the General Division's approach**

[23] At the Appeal Division, the Claimant argues that the General Division has made errors of fact in her appeal. The Claimant argues that lumbar disc herniation is her main medical condition.[12]

[24] She explains that it is a huge challenge to collect any medical evidence about that condition because she had surgery for this condition in 1996 in China. The disc herniation first started when she was 29 years old and resulted in significant limitations. The surgery in 1996 was "extraordinarily successful."[13]

[25] However, the negative effects of the surgery have increased over time. The pain returned. Her functional limitations come from the lumbar disc herniation as well as high blood pressure and diabetes.

[26] The drafting job was a lot of sitting and she took pain medication to cope. The Claimant returned to China several times for treatment. From 2009 to 2016, she was not able to work consistently because of the back pain. She stopped working after a few months in the fast food restaurant in 2016 because of pain and she returned to China for more treatment. The job in 2017 (also in fast food) was harder.

[27] The Claimant explains that she did not see a doctor in Canada about her back pain because she knew the only suggestion would be to take pain medication. That option is too costly in Canada. She argues that her back pain, when considered with other conditions, means that her disability is severe.

– **No possible error of fact in the General Division's decision**

[28] In my view, the Claimant does not have an argument here that the General Division made an error of fact. I understand that the Claimant says that her back pain was significant and that it caused her trouble at work. I also accept that she returned to

[12] The Claimant's arguments are at AD1-16 to 18.
[13] See AD1-17.

China for rest and treatment. I understand her explanation that she stopped working altogether in 2017 because of her disability.

[29] However, The General Division did not ignore or misunderstand the evidence. The General Division reviewed the evidence and decided what it meant for the Claimant.

[30] The Claimant had to show that she was incapable regularly of substantially gainful work on or before December 31, 2011, and ongoing. Her medical information did not speak to her medical situation in and around 2011. At that time, she was unemployed and taking over-the-counter medications for her back pain. The Claimant did have medical evidence about a mental health diagnosis, but it started several years after the end of the MQP.

[31] The General Division considered the Claimant's testimony about her back pain and the medical evidence she was able to provide. Taken together, the General Division decided it did not add up to a severe disability during the MQP.

[32] I have reviewed the evidence from the appeal at the General Division level. I also listened to the Claimant's General Division hearing. I am satisfied that the General Division did not ignore or misunderstand any of the evidence.[14] The General Division reviewed the available evidence and applied the legal test for a severe disability, finding that the Claimant was not able to prove that her disability was severe on or before December 31, 2011.

[33] I am satisfied that the General Division considered and understood the available evidence about the Claimant's health and work history. This is the same evidence she is pointing to again on appeal. Unfortunately, the Claimant's re-statement of her testimony does not give her a reasonable chance of success on appeal. The General Division understood and considered it already.

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[14] This kind of review is consistent with what the Federal Court discussed for the Appeal Division in *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

Conclusion

[34] I am refusing permission to appeal. This means that the appeal will not proceed.

Kate Sellar

Member, Appeal Division