



Citation: *LM v Minister of Employment and Social Development*, 2022 SST 408

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

# **Leave to Appeal Decision**

<b>Applicant (Claimant):</b>	L. M.
<b>Respondent:</b>	Minister of Employment and Social Development
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<b>Decision under appeal:</b>	General Division decision dated March 14, 2022 (GP-21-1188)
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<b>Tribunal member:</b>	Kate Sellar
<b>Decision date:</b>	May 19, 2022
<b>File number:</b>	AD-22-232

## Decision

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

## Overview

[2] L. M. (Claimant) worked as a cook. She stopped working in 2012. She explained that she stopped working because of chronic pain, forgetfulness, anxiety, and a general inability to do many daily activities.

[3] The Claimant applied for a Canada Pension Plan (CPP) disability pension in July 2019. The Minister of Employment and Social Development (Minister) refused her application initially and on reconsideration. The Claimant appealed to this Tribunal.

[4] The General Division decided that the Claimant was not eligible for a disability pension. She was not able to prove with objective medical evidence that she had a serious medical condition on or before December 31, 2011 or anytime during the month of January 2012.

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

[6] The Claimant does not have an argument about an error by the General Division that has a reasonable chance of success on appeal. I am refusing leave to appeal. The appeal will not go ahead.

## Issues

[7] The issues in this appeal are as follows:

- a) Could the General Division have made an error of law in its decision by deciding that the Claimant is not eligible for a disability pension?
- b) Could the General Division have made an error of fact in its decision about the Claimant's carpal tunnel syndrome?
- c) Could the General Division have made an error by failing to provide the Claimant with a fair process?

## Analysis

### Reviewing General Division decisions

[8] 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.

[9] 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.<sup>1</sup>

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

[10] At the leave to appeal stage, a claimant must show that the appeal has a reasonable chance of success.<sup>2</sup> To do this, a claimant needs to show only that there is some arguable ground on which the appeal might succeed.<sup>3</sup>

### **No possible error of law**

[11] The Claimant has not raised an argument about a possible error of law by the General Division that would justify granting permission to appeal.

[12] The Claimant argues that the General Division made an error of law. It seems that the Claimant questions how it could be (in law) that the General Division agrees that she has a disability, but that she is still not eligible for the disability pension.<sup>4</sup>

[13] There is no possible error of law here. The General Division had a specific series of legal questions to answer in the Claimant's appeal. The General Division had to decide whether the Claimant had a disability that was severe and prolonged on or before December 31, 2011 or anytime in January 2012, (I'll call this the "window of time" the General Division needed to stay focused on for the Claimant's appeal).

[14] A disability is severe within the meaning of the CPP when it makes the claimant incapable regularly of pursuing any substantially gainful work.<sup>5</sup>

[15] The Claimant was able to show the General Division that doctors diagnosed her with medical conditions over time. However, she wasn't able to show, using medical evidence, that she had a serious medical condition during the window of time that was the focus of the appeal.<sup>6</sup>

[16] Sometimes, a claimant can have a disability at the time of their General Division hearing and still not qualify for the disability pension. It doesn't necessarily mean that

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<sup>2</sup> See paragraph 58(2) of the Act.

<sup>3</sup> The Federal Court of Appeal explained this idea in a case called *Fancy v Canada (Attorney General)*, 2010 FCA 63.

<sup>4</sup> See AD1-3.

<sup>5</sup> See section 42(2) of the *Canada Pension Plan*.

<sup>6</sup> See *Warren v Canada (Attorney General)*, 2008 FCA 377, and *Canada (Attorney General) v Dean*, 2020 FC 206.

the General Division got the law wrong. The General Division had specific legal rules to apply that required the Claimant to show something more specific than just medical conditions generally. The Claimant had to show she had a serious medical condition during the window of time, and that she was incapable regularly of work at a substantially gainful level during that time.

[17] The General Division analyzed the Claimant's medical evidence in detail before deciding that she did not meet the test for a severe disability during the window of time.<sup>7</sup>

[18] The Claimant has not raised a possible error of law that has a reasonable chance of success on appeal.

### **No possible error of fact**

[19] The Claimant has not shown that she has an arguable case for an error of fact about her carpal tunnel syndrome.

[20] The Claimant says her medical evidence makes it clear that she had surgeries on both her left and her right wrists to treat her carpal tunnel syndrome. She points out that the General Division only mentioned the surgery she had on her right wrist in 1991.<sup>8</sup>

[21] An error of fact happens when the General Division gets a fact wrong in its decision. The fact needs to be important enough that getting it wrong may have changed the outcome of the Claimant's appeal. An error of fact can happen either because the General Division ignored some evidence, or because it misunderstood evidence in a way that squarely contradicts the evidence.

[22] The General Division did not talk about any surgery in the Claimant's left wrist. However, leaving that information out is not important enough that it could change the outcome of the Claimant's case, so it cannot be an error of fact.

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<sup>7</sup> See paragraphs 23 to 30 in the General Division decision.

<sup>8</sup> See AD1-3.

[23] The General Division did not have evidence to suggest that carpal tunnel in either wrist affected the Claimant's ability to work during the window of time. The General Division has to stay focused on whether the disabilities the Claimant has result in limitations that affect her ability to work during the window of time.

### **No possible fair process error**

[24] The Claimant does not have an argument about fair process that has a reasonable chance of success on appeal.

[25] The Claimant says that the General Division did not clearly tell her to get a letter or information from her psychiatrist or psychologist. As a result, she says, her mental health was not part of the General Division's analysis about whether her disability was severe.<sup>9</sup>

[26] The General Division also took several steps to be sure that the Claimant was ready to go ahead with her appeal.<sup>10</sup> The Claimant did not provide evidence from a psychiatrist about her medical conditions on or before the end of her minimum qualifying period. However, in light of the steps the General Division took, there is no argument here that the Claimant's lack of evidence was because of any action or inaction by the General Division.

[27] I am satisfied that the General Division have the Claimant a fair process. What fairness requires depends on the circumstances.<sup>11</sup> Here, the Claimant had every opportunity to make arguments about any fact or factor likely to affect her case.<sup>12</sup>

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<sup>9</sup> See AD1-3.

<sup>10</sup> See paragraphs 15 to 17 in the General Division decision that describe the meetings the General Division held before the hearing to make sure that the Claimant had a fair chance to provide medical information to the tribunal.

<sup>11</sup> This idea comes from a Supreme Court of Canada case called *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

<sup>12</sup> The Federal Court explains this idea in a case called *Kouama v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9008 (FC).

[28] I have reviewed the record.<sup>13</sup> I am satisfied that the General Division did not ignore or misunderstand the evidence.

## **Conclusion**

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

Kate Sellar  
Member, Appeal Division

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<sup>13</sup> This review is consistent with what the Federal Court required in *Karadeolian v Canada (Attorney General)*, 2016 FC 615.