



Citation: *DM v Minister of Employment and Social Development*, 2022 SST 810

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant (Claimant): D. M.

Respondent: Minister of Employment and Social Development

Decision under appeal: General Division decision dated April 22, 2022
(GP-21-1394)

Tribunal member: Kate Sellar

Decision date: August 16, 2022

File number: AD-22-450

Decision

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

Overview

[2] D. M. (Claimant) is a home care worker. In 2015, she was on a deck that collapsed. She injured her lower back, left shoulder, and hips. She has chronic pain. She applied for a Canada Pension Plan (CPP) disability pension on December 4, 2019. The Minister of Employment and Social Development (Minister) refused her application. The Claimant appealed the Minister's decision to this Tribunal.

[3] The General Division dismissed the Claimant's appeal, deciding that the Claimant was not eligible for a disability pension. To be eligible for a disability pension, the Claimant needed to show that her disability was severe. A disability is severe when a person is incapable regularly of pursuing any substantially gainful work. When the Claimant applied, she was working part-time in homecare. For the past two years, she has been working full-time hours in homecare. She is providing live-in care, and is able to manage tasks in ways that accommodate her pain. Although she had functional limitations, they didn't prevent her from working at her usual job as of the date of the hearing.

[4] 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 leave to appeal.

[5] The Claimant has not raised a possible error that would justify granting leave to appeal. The appeal will not go ahead.

Issue

[6] Could the General Division have made an error of fact about the Claimant's ability to work that would justify granting the Claimant permission to appeal?

Analysis

Reviewing General Division decisions

[7] 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.

[8] 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

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

No possible error of fact

[10] There is no possible error of fact about the Claimant’s ability to work by the General Division that would justify granting the Claimant leave to appeal.

[11] The Claimant argues that the General Division made an error of fact about her ability to work. The Claimant argues that even though she is still working, she is unable

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

² See section 58(2) of the Act.

³ The Federal Court of Appeal confirmed this in *Fancy v Canada (Attorney General)*, 2010 FCA 63.

to perform the duties of her job in a timely manner. She says she needs to take breaks and is unable to stand straight. She explains that the pain is excruciating and that the General Division did not fully comprehend the seriousness of her situation.

[12] An error of fact needs to be important enough that it could affect the outcome of the appeal. An error of fact can happen either because the General Division ignored evidence or because a finding of fact isn't supported by the evidence.

[13] The Appeal Division does not have the ability to grant permission to appeal only because the General Division applied the facts to the law and reached a conclusion that the Claimant disagrees with.⁴

[14] The General Division noted that the Claimant needed to "take breaks when doing most tasks including housekeeping and employment tasks."⁵ The General Division reviewed the medical evidence, finding that it showed that the Claimant's pain affects her ability to perform heavy household and employment tasks, but that "she is still performing these tasks using breaks and modifications."⁶ The General Division noted that the Claimant testified about pacing herself at work.⁷

[15] In my view, there is no argument here that the General Division ignored or misunderstood the evidence about the Claimant's ability to work.

[16] The General Division did not ignore evidence. Instead, the General Division discussed in some detail the Claimant's functional limitations because of her pain, and mentioned the ways that she was coping in order to continue to work full-time.

[17] The General Division didn't misunderstand the evidence about the Claimant's work, and the decision is consistent with the Claimant's argument that she needs breaks and that she is in pain when she works.

⁴ See *Garvey v Canada (Attorney General)*, 2018 FCA 118.

⁵ See paragraph 20 in the General Division decision.

⁶ See paragraph 31 in the General Division decision.

⁷ See paragraph 46 in the General Division decision.

[18] The evidence supports the General Division's conclusion that the Claimant was capable regularly of pursuing substantially gainful work: because that is what she was doing at the time of the hearing.

[19] The Claimant's argument is more about the fact that the General Division concluded, based on the work the Claimant does, that she is not eligible for the disability pension. In other words, the Claimant argues that the fact that she needs frequent breaks and that it takes her longer to complete her work should lead to the conclusion that she is incapable regularly of pursuing any substantially gainful work. However, that isn't the type of error I can fix on the Appeal Division. That is a question of how the General Division applied the facts to the law.

[20] The General Division made a decision about the Claimant's ability to work up to April 7, 2022. If the Claimant's medical or employment situation changes over time, she can always reapply for a disability pension in future. She continues to contribute to the CPP.

Conclusion

[21] I refused permission to appeal. This means that the appeal will not go ahead.

Kate Sellar

Member, Appeal Division