Citation: *ED v Minister of Employment and Social Development*, 2022 SST 953

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	E. D.
Respondent:	Minister of Employment and Social Development

Decision under appeal:	General Division decision dated May 19, 2022 (GP-21-1176)

Tribunal member:	Neil Nawaz
Decision date:	September 27, 2022
File number:	AD-22-627

Decision

[1] Leave to appeal is refused. I see no basis for this appeal to go forward.

Overview

[2] The Applicant is a 64-year-old former hard rock miner. In 1987, he injured his right ankle and, in 1993, he injured his back. Despite these injuries, he kept on working until he was laid off in 2007.

[3] The Applicant went back to school and earned a college diploma in business administration and human resources. He was unable to get a job in his field of study, although he did earn some money as a municipal councillor.

[4] In June 2019, the Applicant applied for a Canada Pension Plan (CPP) disability pension, claiming that he could no longer work because of ongoing pain in his ankles, back, and shoulders. The Applicant had already been receiving his early CPP retirement pension since December 2018, so he also applied for the post-retirement disability benefit (PRDB).

[5] The Minister refused both applications. The Applicant appealed those refusals to the Social Security Tribunal. The Tribunal's General Division held a hearing by teleconference and dismissed the appeal for the following reasons:

- The Applicant wasn't entitled to the CPP disability pension because he did not have a severe and prolonged disability as of his minimum qualifying period (MQP), which ended on December 31, 2010;[1] and
- The Applicant wasn't eligible for the PRDB because he hadn't made enough valid CPP contributions in the six years before his application.

[6] The Applicant is now requesting permission to appeal from the Appeal Division. He maintains that he is disabled and alleges that, in coming to its decision, the General Division made the following errors:

[1] Coverage for CPP disability benefits is established by working and contributing to the CPP.

- It found that he had a good education but failed to consider the fact that it was largely acquired after his MQP;
- It found that his work attempts were unsuccessful for reasons other than his disability but failed to consider that his ankle and back pain ruled out office and/or supervisory work;
- It found that he was able to successfully retrain during and after his coverage period but failed to consider that his duties as a municipal councillor were intermittent and limited; and
- It found that he had valid contributions in only two of the six years before his PRDB application without first offering him an opportunity to top up his contributions in other years.

Issue

[7] There are four grounds of appeal to the Appeal Division. An applicant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.[2]

[8] An appeal can proceed only if the Appeal Division first grants leave, or permission, to appeal.[3] At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.[4] This is a fairly easy test to meet, and it means that an applicant must present at least one arguable case.[5]

[9] I have to decide whether the Applicant has raised an arguable case that falls under one or more of the permitted grounds of appeal.

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[2] *Department of Employment and Social Development Act* (DESDA), section 58(1).
[3] DESDA, sections 56(1) and 58(3).
[4] See DESDA, section 58(2).
[5] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

Analysis

[10] I have reviewed the General Division's decision, as well as the law and the evidence it used to reach that decision. I have concluded that the Applicant does not have an arguable case.

There is no arguable case that the General Division erred by considering the Applicant's post-MQP retraining

[11] The Applicant alleges that the General Division held his college education against him, even though he obtained it well after his MQP. He says that, on December 31, 2010, his skill set was not what it is now.

[12] I fail to see an arguable case on this point.

[13] It is true that the Applicant received a diploma in business administration and human resources in 2017 — six years after he last qualified for the CPP disability pension. However, that gap did not bar the General Division from taking the Applicant's education into account when assessing his ability to work in the "real world."

[14] A case called *Villani* requires decision-makers to consider a disability claimant's age, education, and work and life experience.[6] In this case, the General Division noted that the Applicant was 61 years old when he applied for the disability pension, a "factor that usually wouldn't work in his favour" when applying for jobs.[7] However, the General Division also found that the Applicant had graduated from college in June 2011, having excelled in his courses and received recognition for his academic achievement. In making this finding, the General Division raised what it thought was an important point: the Applicant is innately intelligent, and the same intelligence that allowed him to excel in college would also place him at a comparative advantage in the labour market – even with his impairments taken into account.

[15] Contrary to his submissions, it didn't matter when the Applicant received his education. A disability claimant must show that they have a severe and **prolonged**

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[6] See *Villani v Canada (Attorney General)*, 2001 FCA 248.
[7] See General Division decision, paragraph 62.

disability. That means the decision-maker must assess the claimant's employability, not just in the period leading up to the end of their MQP, but for a considerable period afterward. Even if some of it was acquired after the MQP, the Applicant's education would be a relevant factor in determining whether his disability was severe and whether the severity of that disability was likely to persist.

There is no arguable case that the General Division mischaracterized the Applicant's efforts to return to work

[16] The Applicant alleges that the General Division ignored or misconstrued the evidence that he is incapable of returning to work, specifically:

- His lower back has continued to deteriorate, as indicated by a 2020 MRI; and
- His ankle pain does not allow him to perform supervisory duties at job sites.

[17] Again, I don't see an arguable case here.

[18] One of the General Division's jobs is to make findings of fact. In doing so, it is presumed to have considered all the evidence before it.[8] In this case, I don't see any indication that the General Division overlooked the impact of the Applicant's ankle and back pain on his ability to regularly pursue employment.

[19] In its decision, the General Division noted that the Applicant had osteoarthritis in his right ankle and chronic pain in his back, neck, and shoulders.[9] However, the General Division also noted the Applicant's testimony that, as of December 31, 2010, he was able to sit for half an hour to an hour at a time. He said that he was able to make it through two-hour lectures that had a break in the middle. The fact that the Applicant successfully completed his studies suggested to the General Division that it would have been possible for him to continue to work with minimal accommodations.[10]

[20] The Applicant alleges that the General Division ignored an MRI report of his lumbar spine that showed significant deterioration in his back.[11] However, the General

[8] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[9] See General Division decision, paragraph 33.
[10] See General Division decision, paragraphs 70 and 72.
[11] See MRI of the lumbar spine dated October 11, 2020, GD2-101.

Division had good reason to gave that report little or no weight, since it was produced nearly a decade after the Applicant's coverage period ended. As the General Division noted, the Applicant's medical file contained no evidence about his back after 2010.[12]

[21] In its role as finder of fact, the General Division is permitted to draw reasonable conclusions from the evidence before it. In this case, I don't see how the General Division erred in concluding that the Applicant had work capacity during his MQP.

There is no arguable case that the General Division mischaracterized the Applicant's political career

[22] The Applicant insists that his term as a municipal councillor should not have been held against him. He says that his duties as an elected official on average occupied only two hours of his time, twice a month, with council meeting only once a month for three months of the year.

[23] I don't see a case for this argument either.

[24] In its decision, the General Division found that the Applicant had demonstrated capacity after his MQP, but it did not base that finding on his political activities. Instead, the General Division turned him down because of his post-MQP college. In fact, the General Division did not mention the Applicant's council work at all, even though the evidence suggested that it earned him at least $5,000 per year from 2015 to 2017.[13]

[25] I don't think the General Division can be faulted for relying on evidence that, to all appearances, played no part in its reasoning.

There is no arguable case that the General Division owes the public legal advice

[26] The Applicant complains that no one ever told him he needed only one more year of CPP contributions to become eligible for the PRDB. He says that the General Division should have acknowledged as much for the benefit of others in his situation.

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[12] See General Division decision, paragraph 47.
[13] See Applicant's record of earnings, GD2-165.

[27] I don't see an arguable case on this point.

[28] According to his record of earnings (ROE), the Applicant recorded valid contributions in only two of the six years preceding his PRDB application.[14] The ROE, which is typically compiled and produced by the Minister, is presumed to be accurate.[15] For that reason, the General Division was entitled to rely on it in finding the Applicant ineligible for the PRDB.

[29] Ignorance of the law is not a ground of appeal.[16] The General Division was under no obligation to advise the Applicant of any deficiencies in his claim before the hearing. It was up to the Applicant to familiarize himself with the eligibility requirements of the PRDB before applying for it.

Conclusion

[30] The Applicant has not identified any grounds of appeal that would have a reasonable chance of success on appeal. Thus, permission to appeal is refused.

Member, Appeal Division

[14] See Applicant's record of earnings, GD2-164.
[15] See section 97(1) of the *Canada Pension Plan.*
[16] See *Canada (Attorney General) v Hislop*, 2007 SCC 10 and *Canada (Attorney General) v Kaler*, 2011 FCA 266.