



Citation: *CS v Minister of Employment and Social Development*, 2022 SST 962

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant (Claimant): C. S.
Representative: H. S.

Respondent: Minister of Employment and Social Development

Decision under appeal: General Division decision dated June 12, 2022
(GP-21-850)

Tribunal member: Kate Sellar

Decision date: October 3, 2022

File number: AD-22-657

Decision

[1] I am refusing leave (permission) to appeal. The appeal won't go ahead to the next step. These reasons explain why.

Overview

[2] C. S. (Claimant) applied for a CPP disability pension in October 2019. He worked as a heavy duty mechanic. He's had several concussions over the years. In February 2017, a 900-pound chain hit him in the head at work. In November 2017, he was involved in a truck rollover.

[3] The Claimant says that he had been unable to work since January 2019 because of chronic post-concussive syndrome. His symptoms include migraine headaches, dizziness, balance issues, chronic fatigue, and memory loss.

[4] The Minister of Employment and Social Development Canada (Minister) refused the Claimant's application initially and on reconsideration. The Claimant appealed the Minister's reconsideration decision to this Tribunal.

[5] The General Division decided that the Claimant's disability interfered with his ability to work by the end of December 2020, but his condition improved with medication. The Claimant had some capacity to work and was not able to show efforts to get and keep work were unsuccessful because of his disability.

[6] 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 the Claimant leave (permission) to appeal.

[7] The Claimant has not raised an arguable case for an error that would justify giving him permission to appeal. The appeal will not go ahead to the next step.

Issue

[8] Could the General Division have made an error by failing to provide the Claimant with a fair process during the hearing?

Analysis

Reviewing General Division decisions

[9] 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.

[10] 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

[11] 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 argument for a fair process error by the General Division

[12] The Claimant has not raised an argument about a lack of fair process that has a reasonable chance of success on appeal. The Claimant’s arguments are not about any possible error that the General Division made, and instead focus on issues with his former representative.

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 a case called *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[13] The Claimant argues that the General Division failed to provide him with a fair process. He explains that:

- The General Division relied on medical documents that the Claimant didn't review before his representative filed them.
- He now has additional medical information that his representative did not provide to the Tribunal.

[14] The General Division must provide a fair process to the Claimant. What fairness requires in each case depends on the circumstances. The Claimant needs to have a fair chance to make arguments on every fact or factor likely to affect the decision.⁴

[15] The issues the Claimant raises about the fairness of the process are about his representative, not the General Division, so they have no reasonable chance of success on appeal.

[16] The General Division does not have control over which medical documents a representative chooses to file with the Tribunal, or whether the representative made sure that their client read all of the documents in the appeal.

[17] Similarly, if the Claimant has more evidence that his representative did not provide to the Tribunal, that is not the basis of a fair process error by the General Division. The Claimant is not alleging that the General Division refused to consider evidence in a way that was unfair.

[18] The Claimant's issue is not about anything that the General Division did (or didn't do) to make sure that the Claimant had a fair hearing. The Claimant's arguments about the General Division failing to provide him with a fair process have no reasonable chance of success.

⁴ These ideas about fair process come from *Baker v Canada (Minister of Citizenship and Immigration)* 1999 CanLII 699, and *Kouama v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9008.

I cannot consider new medical evidence the Claimant argues his lawyer didn't file

[19] It may be that the Claimant wants the Appeal Division to review the evidence that the General Division never had and make a new decision. I can't do that.

[20] My role on the Appeal Division is to decide whether the General Division made an error (and if they did, to decide how to fix that error). Considering new medical evidence about the Claimant's disability that the General Division didn't have doesn't help me to decide whether the General Division made an error. The Appeal Division does not usually accept new evidence.⁵

[21] When claimants have new information or evidence that was not available to the General Division, in **limited circumstances** they can ask the General Division to rescind or amend (cancel or change) their decision.⁶ If the Claimant considers this option, it would be prudent to file the application without delay.

General Division didn't ignore or misunderstand any evidence

[22] I have reviewed the record to see whether the General Division might have ignored or misunderstood any important evidence.⁷ In my view, the General Division paid careful attention to what the Claimant's medical evidence said about the Claimant's capacity for alternate work.⁸ Where there is evidence of some capacity for work, claimants have to show that efforts to get and keep work were unsuccessful because of their disability.⁹

[23] The General Division considered the Claimant's testimony about his limitations, his work efforts, and the available information about his personal circumstances (like his age education, language abilities, and past work and life experience) and concluded

⁵See *Parchment v. Canada (Attorney General)*, 2017 FC 354 (CanLII)

⁶ Information about that option is available on the Tribunal's website at:

<https://www.sst-tss.gc.ca/en/your-appeal/other-cpp-appeals-rescind-or-amend>

⁷ This review is consistent with the Federal Court's decision in *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

⁸ See especially paragraphs 38 to 40 in the General Division decision.

⁹ See *Inclima v Canada (Attorney General)*, 2003 FCA 117.

that the Claimant's disability is not severe within the meaning of the *Canada Pension Plan*.¹⁰ I see no possible error in the General Division's decision that would justify granting the Claimant permission to appeal.

Conclusion

[24] I refused permission to appeal. This means that the appeal won't go ahead to the next step.

Kate Sellar
Member, Appeal Division

¹⁰ The Claimant was 30 years old when his coverage period for CPP disability pension ended.