Citation: *AP v Minister of Employment and Social Development*, 2022 SST 1134

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	A. P.
Representative:	G. S.
Respondent:	Minister of Employment and Social Development

Decision under appeal:	General Division decision dated July 17, 2022 (GP-20-2016)

Tribunal member:	Neil Nawaz
Decision date:	October 28, 2022
File number:	AD-22-730

Decision

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

Overview

[2] The Claimant is a 60-year-old former machine operator who fractured his right wrist in an October 2014 motor vehicle accident. He hasn't worked since.

[3] In August 2018, the Claimant applied for a Canada Pension Plan (CPP) disability pension.[1] He claimed that he could no longer work because of ongoing pain in his right wrist and shoulder, as well as other medical conditions such as chronic pain syndrome, post-traumatic stress disorder, and major depressive disorder.

[4] The Minister refused the Claimant's application because, in her view, the Claimant had not shown that he had a severe and prolonged disability during his minimum qualifying period (MQP), which ended on December 31, 2015.[2] The Minister also found no evidence of any disability that had started during the Claimant's "prorated" period, which ran from January 1, 2017 to July 31, 2017.[3]

[5] The Claimant appealed the Minister's refusal to the Social Security Tribunal's General Division. The General Division held a hearing by teleconference and dismissed the appeal. It found insufficient evidence that the Claimant was regularly incapable of a substantially gainful occupation. Among other factors, the General Division found that the Claimant had not made sufficient effort to pursue alternative employment that might have been within his capabilities.

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[1] This is the Claimant's second application. He previously applied for the CPP disability pension in April 2016. The Minister refused that application in September 2016, and the Claimant did not ask for reconsideration.
[2] The MQP is the period in which a claimant last had coverage for CPP disability benefits. Coverage is established by working and contributing to the CPP.
[3] Section 44(2.1) of the *Canada Pension Plan* exempts claimants from the full contribution requirement if they can show that they became disabled at some point during what would have been the final year of their contribution period.

[6] The Claimant 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:

- It assumed that he was not disabled because of the lack of evidence supporting some of his claimed medical conditions;
- It failed to consider his condition its totality; and
- It failed to consider his background and personal characteristics.

Issue

[7] There are four grounds of appeal to the Appeal Division. A claimant 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.[4]

[8] An appeal can proceed only if the Appeal Division first grants leave, or permission, to appeal.[5] At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.[6] This is a fairly easy test to meet, and it means that a claimant must present at least one arguable case.[7]

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

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[4] See *Department of Employment and Social Development Act* (DESDA), section 58(1).
[5] See DESDA, sections 56(1) and 58(3).
[6] See DESDA, section 58(2).
[7] 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 Claimant does not have an arguable case.

The General Division was entitled to draw conclusions from the evidence—or lack of it

[11] The Claimant criticizes the General Division for inferring capacity from gaps in the supporting medical information.

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

[13] In this case, the General Division found that the Claimant had not met the burden of proving that he became disabled during the MQP or the prorated period. The General Division noted that, while the Claimant may have had difficulty using his right hand, there was no evidence that he was incapable of jobs that did not involve the use of heavy machinery.

[14] In CPP disability cases, the burden of proof lies with claimants to show that, on balance, they are incapable of regular employment. It was up to the Claimant to submit evidence of his disability, and it was open to General Division to make reasonable inferences from that evidence—or lack of it.[8]

The General Division considered the Claimant's condition in totality

[15] The Claimant alleges that the General Division erred by relying on individual aspects of his impairments without adopting a "holistic" view of his condition.

[16] Again, I don't see an arguable case on this point.

[17] The leading case on this subject is *Bungay*, which requires decision-makers to assess employability in light of all the circumstances, including a claimant's background

[8] See *Dhillon v Minister of Human Resources Development* (November 16, 1998), CP 5834 (PAB).

and their overall medical condition, not just the "biggest" or "dominant" impairments.[9] In this case, the General Division's decision contains a thorough summary of the Claimant's medical file, followed by an analysis that meaningfully discusses his impairments in the context of his personal characteristics and "real world" employment prospects. I am satisfied that the General Division considered the Claimant's major complaints—not just his wrist and shoulder pain, but also his other physical and psychological conditions—individually and cumulatively

[18] It is settled law that judicial and quasi-judicial decision-makers are presumed to have considered all the evidence before them and don't have to discuss each and every aspect of the parties' submissions.[10] Here, I see no indication that the General Division ignored, or gave inadequate consideration to, the available evidence.

The General Division considered the Claimant's background and personal characteristics

[19] The Claimant suggests that the General Division misapplied an important case called *Villani*, which requires disability to be considered in a "real world" context, taking into account a claimant's age, work experience, level of education, and language proficiency. The Claimant specifically alleges that the General Division erred when it found that he remains employable, even though he was over 50 and lacked proficiency in English at the time of his MQP and prorated period.

[20] Again, I don't see a case for this argument, which is essentially a request to reassess evidence. I note the words of the Federal Court of Appeal in *Villani*:

> [A]s long as the decision-maker applies the correct legal test for severity—that is, applies the ordinary meaning of every word in the statutory definition of severity in subparagraph 42(2)(a)(i) [of the CPP] he or she will be in a position to judge on the facts whether, in practical terms, an applicant is incapable regularly of pursuing any substantially gainful occupation. The

[9] See *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[10] See *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

> assessment of the applicant's circumstances is a question of judgment with which this Court will be reluctant to interfere.[11]

This passage suggests that the General Division, in its role of fact finder, should be given some leeway in how it assesses a claimant's background. It also implies that **whether** the test for disability was applied matters more than **how** it was applied. This approach happens to align with Federal Court of Appeal decisions that prevent the Appeal Division from intervening on questions of mixed fact and law.[12]

[21] In its decision, the General Division correctly cited *Villani* and analyzed in detail the likely impact, given his impairments, of the Claimant's background and personal characteristics on his employment prospects:

> In this case, the Claimant was 53 years old as of December 31, 2015 (and 54 years old as of July 31, 2017). He was educated up to grade 10 in India. He worked in India as a machine operator. He moved to Canada in 1984. He has worked for several employers in Canada as a machine operator. He has also worked in a woodworking shop as a supervisor/carpenter. He is able to speak and understand English. He can read and write a little bit in English.
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> The Claimant was capable of doing sedentary work as of December 31, 2015 and in 2017 by July 31, 2017. His education level and work experience may present barriers to obtaining this type of work, however, he was young enough to pursue retraining. I therefore find that the Claimant can work in the real world.[13]

[22] In light of this passage, it cannot be said that the General Division was unmindful of *Villani* or that it did not attempt to apply its chief principle. From that standpoint, the General Division fulfilled its duty under the law. It examined the Claimant's profile. It found that, even at his age and with his limited English, he was still capable of attempting physically undemanding work. It concluded that, because he had not fulfilled

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[11] See *Villani v Canada (Attorney General)*, 2001 FCA 248, paragraph 49.
[12] See *Quadir v Canada (Attorney General)*, 2018 FCA 21.
[13] See General Division decision, paragraphs 47–48.

his duty to make such attempts, it was not possible to assess the severity of his disability.

[23] The Claimant might not agree with the General Division's analysis or find it reasonable, but that is not sufficient reason to overturn a decision. The Claimant had to explain in specific terms how the General Division misunderstood or misapplied the *Villani* test. He has not managed to do so.

Conclusion

[24] The Claimant 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