Citation: *BH v Minister of Employment and Social Development*, 2022 SST 1422

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	B. H.
Representative:	T. T.
Respondent:	Minister of Employment and Social Development

Decision under appeal:	General Division decision dated August 30, 2022 (GP-21-1062)

Tribunal member:	Neil Nawaz
Decision date:	December 20, 2022
File number:	AD-22-899

Decision

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

Overview

[2] The Claimant is a 44-year-old former oil field worker who sustained an on-the-job back injury in 2016. After taking time off to receive physiotherapy, he returned to work to find that he could no longer tolerate the physical demands of his job. He hasn't worked since March 2017. He underwent back surgery in November 2018.

[3] In July 2020, the Claimant applied for a Canada Pension Plan (CPP) disability pension. In his application, he said that he could no longer work because of constant back, knee, and hip pain, as well as osteoarthritis and depression.

[4] The Minister refused the 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, 2019.[1] The Minister also found no evidence of any disability that had started during the Claimant's "prorated" period, which ran from January 1, 2020 to January 31, 2020.[2]

[5] The Claimant appealed the Minister's decision to the Social Security Tribunal's General Division. He said that his pain was getting worse. He also said that his mobility was limited and that he could not remain in position for any length of time.

[6] The General Division held a hearing by teleconference and dismissed the appeal. It found that, although the Claimant did have some physical limitations, there wasn't enough evidence to show that he had a severe and prolonged disability during his MQP or prorated period. The General Division also found that the Claimant had not

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[1] 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.
[2] 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.

made sufficient effort to retrain or pursue alternative employment that might have been within his capabilities.

[7] 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 ignored evidence that he continues to suffer ongoing complications related to lumbar degenerative disc disease; and
- It ignored evidence that the "gap" in his medical file at the end of his MQP was because of inability to access documents from X Medical Clinic.

Issue

[8] 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.[3]

[9] An appeal can proceed only if the Appeal Division first grants leave, or permission, to appeal.[4] At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.[5] This is a fairly easy test to meet, and it means that a claimant must present at least one arguable case.[6]

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

Analysis

[11] 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.

There is no arguable case that the General Division ignored the Claimant's back pain

[12] The Claimant alleges that the General Division disregarded the severity of his ongoing back condition, which he maintains leaves him incapable of any kind of substantially gainful employment.[7]

[13] I don't see an arguable case for this allegation.

[14] One of the General Division's roles is to establish facts. In doing so, it is presumed to have considered all the evidence before it.[8] However, there is no need to make such a presumption in this case because it is clear that the General Division did in fact consider the Claimant's back condition—at length.

[15] In its decision, the General Division noted that, although the Claimant underwent a bilateral stabilization of the lumbar spine in November 2018, there were only two medical reports on file after that date—and neither of them compellingly made a case for disability. As the General Division noted, an x-ray of the Claimant's lumbar spine described a "near-anatomic" alignment of the lumbar spine, moderate degenerative disc disease at L4-5 and L5-S1, and no post-surgical hardware complications.[9] There was also a disability questionnaire, in which the Claimant's family physician declared him "totally disabled." However, as the General Division noted, the same physician

[7] See Claimant's application requesting leave to appeal dated December 1, 2022, AD1-3.
[8] See *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[9] See General Division decision, paragraph 47, referring to lumbar radiology report dated October 22, 2020, GD2-123.

reportedly said two years earlier that the Claimant was only barred from jobs that required heavy lifting—and that statement was made before his surgery.[10]

[16] The General Division also found that the Claimant had not exhausted all treatment options. It noted that a neurosurgeon had recommended that the Claimant undergo a second rhizotomy (a procedure in which nerve endings are burned off), following a first attempt that failed to bring lasting relief. In light of this recommendation, the General Division concluded that there was likely scope for improvement in the Claimant's back condition, although, in the absence of further evidence, it was impossible to say how much.[11]

[17] The Claimant may not agree with the General Division's analysis, but he can't reasonably argue that the General Division ignored his back condition. From what I can see, the General Division considered the Claimant's lumbar pain but concluded that it did not amount to a severe and prolonged disability. In its role as finder of fact, the General Division is entitled to some leeway in how it assesses and analyzes the available evidence.[12] The Claimant may say that he suffers from disabling pain, but such testimony was only one of several factors that the General Division had to consider.

There is no arguable case that the General Division ignored the Claimant's explanation for the gap in his medical records

[18] The Claimant criticizes the General Division for inferring capacity from gaps in his medical file.

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

[20] 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

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[10] See General Division decision, paragraphs 33–35, referring to physician's statement of disability by Dr. Michael Wilson dated October 23, 2020 (GD2-121); and specialist's review by Dr. Kevin F. Smith dated June 20, 2018 (GD3-73)
[11] See General Division decision, paragraph 38.
[12] See *Simpson*, note 8.

Division noted that, while the Claimant might have had back pain, there was no evidence that he was incapable of pursuing an alternative career in a less physically demanding line of work. 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.[13]

[21] The Claimant insists there was a good reason for the absence of medical records following his back surgery and in the year leading up to the end of his coverage periods. He suggests that he tried to obtain such records, but his clinic never gave them to him. That may be true, but the General Division can't be expected to speculate about the contents of doctors' reports that may or may not exist. Whatever the reason for the evidentiary gap, the fact remains that the General Division had no objective way to assess the Claimant's condition during a crucial period. Seen in that light, the General Division can't be criticized for finding the Claimant failed to meet the burden of proof.

Conclusion

[22] 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

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