



Citation: *BA v Minister of Employment and Social Development*, 2023 SST 706

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

**Applicant:** B. A.  
**Representative:** A. E.  
**Respondent:** Minister of Employment and Social Development

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**Decision under appeal:** General Division decision dated February 6, 2023  
(GP-22-195)

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**Tribunal member:** Kate Sellar  
**Decision date:** **June 5, 2023**  
**File number:** AD-23-412

## Decision

[1] I am refusing leave (permission) to appeal. The appeal will not proceed.

## Overview

[2] B. A. (Claimant) is a unit clerk at a hospital. At the time of her General Division hearing, she was working. It was extremely difficult.

[3] The Claimant applied for a *Canada Pension Plan* (CPP) disability pension on January 5, 2021. The Minister of Employment and Social Development (Minister) refused her application initially and on reconsideration. The Claimant appealed to this Tribunal.

[4] The General Division dismissed the Claimant's appeal, finding that she wasn't eligible for the disability pension because her disability wasn't "severe" within the meaning of the CPP.

## Issues

[5] The issues in this appeal are:

- a) Can it be argued that the General Division made an error that would justify granting the Claimant permission to appeal?
- b) Does the Claimant set out evidence that wasn't presented to the General Division that would justify granting permission to appeal?

## I'm not giving the Claimant permission to appeal

[6] I can give the Claimant permission to appeal if their application raises an arguable case that the General Division:

- didn't follow a fair process;
- acted beyond its powers or refused to exercise those powers;

- made an error of law;
- made an error of fact; or
- made an error applying the law to the facts.<sup>1</sup>

[7] I can also give the Claimant permission to appeal if their application sets out evidence that wasn't presented to the General Division.<sup>2</sup>

[8] Since the Claimant hasn't raised an arguable case and hasn't set out new evidence, I must refuse permission to appeal.

### **There's no arguable case that the General Division made an error**

[9] The Claimant argues that the General Division made an error by dismissing her appeal because she was still working. She points out how extremely difficult it is for her to work given her disabilities. She has no choice but to continue working so that she can make ends meet, and her full salary still means that she can barely afford food.<sup>3</sup>

[10] I don't question at all what the Claimant is saying about how difficult her financial situation is, and therefore why she continues to work.

[11] The CPP provides a disability pension for people whose disabilities are both severe and prolonged on or before the last day of their coverage period.<sup>4</sup> A disability is severe if a person is incapable regularly of pursuing any substantially gainful work.<sup>5</sup> The focus in the CPP isn't on the medical conditions themselves, but rather on how the disability affects the person's ability to work.<sup>6</sup>

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<sup>1</sup> See section 58.1(a) and (b) in the *Department of Employment and Social Development Act (Act)*.

<sup>2</sup> See section 58.1(c) of the Act.

<sup>3</sup> The Claimant checked the box for an error of procedural fairness. I've considered the unfairness she is referring to as possible errors of fact or law or a mixed error because she didn't describe a process problem.

<sup>4</sup> See section 42(2)(a) of the *Canada Pension Plan (CPP)*.

<sup>5</sup> See section 42(2)(a)(i) of the CPP.

<sup>6</sup> See *Klabouch v Canada (Social Development)*, 2008 FCA 33; and *Ferreria v Canada (Attorney General)*, 2013 FCA 81.

[12] The General Division applied each part of that legal test to the Claimant's situation. It is not impossible for a person who continues to work to be eligible for the disability pension. For example, a person's work might be so modified that it is really a benevolent employer. Or a person might be working at their maximum capacity and might still be so unreliable that they are still **incapable regularly** of work. Further, person might be working at their maximum capacity and be able to retrain for a different job that would be substantially gainful.

[13] The Claimant hasn't raised an arguable case for an error in the way the General Division considered the work she was doing. If the General Division had simply dismissed the Claimant's appeal simply because she works, that could be an error of law. But instead, the General Division considered the ways in which a person might still be eligible for the disability pension even though they've been working. It analyzed:

- the Claimant's functional limitations, as well as the tasks she completes at work despite those limitations<sup>7</sup>
- the medical evidence and the Claimant's testimony about her functional limitations<sup>8</sup>
- the ways her personal circumstances could affect her ability to work in the real world<sup>9</sup>
- the fact that she's earned a substantially gainful income (more than \$52,500 a year since 2014)<sup>10</sup>
- the Claimant's performance in the job, including whether the employer modified the job and whether the Claimant was reliable<sup>11</sup>

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<sup>7</sup> See paragraphs 19 to 27 in the General Division decision.

<sup>8</sup> See paragraphs 19 to 38 in the General Division decision.

<sup>9</sup> See paragraphs 39 to 41 in the General Division decision.

<sup>10</sup> See paragraph 42 in the General Division decision.

<sup>11</sup> See paragraphs 43 to 44 in the General Division decision.

[14] As a result, the General Division didn't simply dismiss the appeal because the Claimant worked, but instead applied all parts of test for a disability pension to her situation, to decide whether she meets the requirements for the disability pension. I see no arguable case for an error based on the General Division's analysis.

### **The Claimant didn't set out new evidence**

[15] The Claimant didn't set out new evidence that wasn't presented at the General Division, so I cannot grant permission to appeal on that basis either.

### **No other possible errors**

[16] I've reviewed the Claimant's file, and I see no other possible errors in the General Division's process or fact finding that would justify granting leave to appeal.<sup>12</sup>

[17] I echo the General Division member's final note: if the Claimant's situation in terms of her health or employment changes, she can absolutely reapply for the disability pension.

### **Conclusion**

[18] I've refused permission to appeal. This means that the appeal will not proceed.

Kate Sellar  
Member, Appeal Division

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<sup>12</sup> This kind of review of the record is consistent with the Federal Court's decision in *Karadeolian v Canada (Attorney General)*, 2016 FC 615.