



Citation: *MS v Minister of Employment and Social Development*, 2023 SST 1282

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: M. S.
Representative: Jaswinder Johal

Respondent: Minister of Employment and Social Development

Decision under appeal: General Division decision dated May 22, 2023
(GP-21-2570)

Tribunal member: Kate Sellar

Decision date: **September 15, 2023**

File number: AD-23-728

Decision

[1] I'm refusing the Claimant leave (permission) to appeal. The appeal will not proceed. These are the reasons for my decision.

Overview

[2] M. S. (Claimant) stopped working as a machine operator in April 2020. She had uterine fibroids and vaginal bleeding. She had surgery. She has not returned to work due to pain in her back and knees, high blood pressure, and depression.

[3] The Claimant applied for a *Canada Pension Plan* (CPP) disability pension on June 15, 2021. The Minister of Employment and Social Development (Minister) refused her application initially and on reconsideration. She appealed to this Tribunal.

[4] The General Division dismissed the Claimant's appeal. The General Division decided that the Claimant's medical evidence didn't support that her disability was severe within the meaning of the CPP. She had some capacity to work and didn't make any efforts to get and keep work within her limitations.

Issues

[5] The issues in this appeal are:

- a) Could the General Division have made an error of fact about the medical reports that would justify giving the Claimant permission to appeal?
- b) Could the General Division have made an error of law by failing to consider all the evidence together?
- c) Could the General Division have made an error of law by failing to consider whether the Claimant was employable in the real world?
- d) Does the application set out evidence that wasn't presented to the General Division?

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.¹

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

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

I cannot be argued that the General Division made an error of fact about the medical reports.

[9] The Claimant argues that the General Division made an error of fact by finding that the medical reports didn't support that the Claimant's disability was severe within the meaning of the CPP.³ Specifically, the Claimant argues that the CPP Medical Report clearly mentions impairments along with the comment that the Claimant is unable to work.⁴ It seems that the Claimant argues that the General Division ignored or misunderstood this report.

[10] The General Division discussed the same aspects of the report that the Claimant highlights on appeal. However, the General Division also noted that the report is dated

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

² See section 58.1(c) of the Act.

³ See paragraphs 25 and 30 in the General Division decision.

⁴ See AD1-12.

May 10, 2021 and that the report states the Claimant is likely to improve.⁵ I note that the report doesn't provide any answer at all about whether, from a strictly medical standpoint, the doctor expects the Claimant to return to any type of work in the future.⁶

[11] The Claimant hasn't raised an arguable case for an error of fact. A disability is severe not simply when there are impairments or when a doctor confirms that at some point, the Claimant was unable to work. A person with a severe disability is incapable regularly of pursuing any substantially gainful work.⁷ It seems that the General Division discussed the CPP Medical Report in its totality, and not only the parts the Claimant wishes to highlight.⁸

[12] The Claimant hasn't raised any argument that has a reasonable chance of success about any aspect of the medical evidence that the General Division ignored or misunderstood.

[13] Accordingly, I'm not giving the Claimant permission to appeal based on a possible error of fact by the General Division.

It cannot be argued that the General Division made an error of law in its approach to analyzing the Claimant's conditions.

[14] The Claimant argues generally that the General Division failed to consider the totality of the evidence and material before it. When deciding whether a disability is severe within the meaning of the CPP, failing to consider all the medical conditions together can be an error of law.⁹

[15] The Claimant hasn't raised an arguable case for an error of law here. The Claimant didn't make any arguments about what conditions the General Division may have missed, or what part of the reasons might show that the General Division didn't take the correct approach by considering all the Claimant's conditions. I don't see any

⁵ See paragraph 25 in the General Division decision.

⁶ See GD2-101 to 106 for the CPP Medical Report.

⁷ See section 42(2) of the *Canada Pension Plan* (CPP).

⁸ See paragraphs 25 to 30 in the General Division decision.

⁹ See *Klabouch v Canada (Social Development)*, 2008 FCA 33.

support in the record for the idea that the General Division failed to consider all the Claimant's conditions together.

[16] Accordingly, I'm not giving the Claimant permission to appeal based on a possible error of law by the General Division.

It cannot be argued that the General Division made an error of law by failing to consider the Claimant's real-world employability.

[17] The Claimant argues that the General Division failed to consider her personal circumstances that negatively impact her employability in the real world. The Claimant argues that the General Division failed to consider her age, education level, language proficiency, and past work and life experience as the law requires.¹⁰

[18] The General Division discussed each of the factors that impact the Claimant's employability in its decision.¹¹ The General Division conclude that the Claimant had limited English language skills and that her work history was mainly factory work.

[19] The Claimant hasn't raised an arguable case for an error of law based on failure to consider and apply the legal test about the Claimant's real-world employability. The General Division acknowledged those barriers to the Claimant's employability, but ultimately decided that the Claimant still had capacity to work to retrain for work.

[20] The Claimant has not raised a challenge to that part of the General Division's decision that has a reasonable chance of success.

[21] Accordingly, I'm not giving the Claimant permission to appeal based on a possible error of law about failing to consider the Claimant's real-world employability.

The Claimant didn't set out new evidence.

[22] The Claimant didn't set out new evidence, so new evidence cannot form the basis for giving her permission to appeal.

¹⁰ See *Villani v Canada (Attorney General)*, 2001 FCA 248.

¹¹ See paragraphs 32 to 35 in the General Division decision.

[23] I've reviewed the written record, and I'm satisfied that the General Division didn't ignore or misunderstand the evidence.¹² The Claimant has medical conditions. She has some additional challenges to her employability. However, the General Division took the medical conditions and the employability factors into account and decided that she had some capacity to work. As a result, the Claimant had to show that efforts to get and keep work were unsuccessful because of her disability. The General Division found that the Claimant didn't look for work within her limitations or to retrain for different work. The Claimant hasn't challenged this finding of fact about her work efforts, only whether that requirement should apply to her. There is no arguable case for an error that would justify granting permission to appeal.

Conclusion

[24] I'm refusing the Claimant permission to appeal. This means that the appeal will not go ahead.

Kate Sellar
Member, Appeal Division

¹² This kind of review is consistent with the Tribunal's role as the Federal Court discussed in *Karadeolian v Canada (Attorney General)*, 2016 FC 615.