



Citation: *BW v Canada Employment Insurance Commission*, 2022 SST 1024

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant:	B. W.
Representative:	K. W.
Respondent:	Canada Employment Insurance Commission
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Decision under appeal:	General Division decision dated August 27, 2022 (GE-22-1500)
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Tribunal member:	Stephen Bergen
Decision date:	October 16, 2022
File number:	AD-22-676

Decision

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

Overview

[2] The Applicant, Ms. W., is the Claimant in this case. The Claimant's son had suffered a stroke and required constant care so she took a personal leave from her employer to care for him. She applied for Employment Insurance sickness benefits on March 20, 2020.

[3] It appears that the Commission considered the application to be an application for regular benefits. However, the Claimant told the Commission on September 27, 2021, that she had actually meant to select compassionate care benefits. On January 5, 2022, the Commission agreed to consider her benefits as compassionate care benefits. It allowed that she had been entitled to a total of 26 weeks of compassionate benefits.

[4] However, the Commission decided that the Claimant was not available for work after March 29, 2021. It said that the Claimant's family responsibilities prevented her from accepting a job. This meant that the Claimant was not entitled to benefits after March 29, 2021, and should not have received them. The Commission asked her to repay the later benefit payments.

[5] When the Claimant asked the Commission to reconsider, it changed its decision, but not in the Claimant's favour. On March 3, 2022, the Commission found that the Claimant was unavailable for work effective September 28, 2020, which was even earlier than March 29, 2021. As a result, the Claimant would have to repay more of benefits she had received. She appealed the reconsideration decision to the General Division.

[6] At the General Division, the Commission confirmed that it had changed her benefits to compassionate care benefits for the first 26 weeks of her claim. As a result, it acknowledged that the Claimant did not need to prove availability before March 29, 2021. The General Division accepted the Commission's submission and it treated the

appeal as though the only issue was whether the Claimant was disentitled in the period from March 29, 2021, onward.

[7] The General Division dismissed the appeal. It found that the Claimant remained disentitled from March 29, 2021, because she was not available for work in this period.

[8] The Claimant is now asking the Appeal Division for leave to appeal the General Division decision.

[9] I am refusing leave. The Claimant has not made out an arguable case that the General Division made an error. She has not pointed to any fact that the General Division ignored or misunderstood that is relevant to the General Division's decision dismissing her appeal.

Issue

[10] Is there an arguable case that the General Division based its decision on a finding that ignored or misunderstood the Claimant's evidence about her ability to work?

Analysis

General principles

[11] For the Claimant's application for leave to appeal to succeed, her reasons for appealing have to fit within the "grounds of appeal." To grant the leave to appeal application, I have to find that there is an arguable case that the General Division made one or more of the following errors:¹

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
3. The General Division based its decision on an important error of fact.

¹ An arguable case would be some argument that an applicant could make and possibly win.

4. The General Division made an error of law when making its decision.²

[12] To grant this application for leave and permit the appeal process to move forward, I must find that there is a reasonable chance of success on one or more grounds of appeal. The courts have equated a reasonable chance of success to an “arguable case”.³

[13] The leave to appeal application form asks applicants to explain why they are appealing a General Division decision to the Appeal Division. When the Claimant completed the form, she selected the ground of appeal that identifies an important error of fact. She further explained that a Commission agent assisted her to complete the original form and that the agent made a mistake. The Claimant says that she should have answered “Yes” to the question about her ability to work.

Important error of fact

[14] The law says that a claimant must be “capable of and available for work” to be entitled to regular benefits.⁴ That means that a claimant must be capable and **also** available for work. A claimant who is physically capable of work but not available for work is not entitled to regular benefits.

[15] In her leave to appeal application, the Claimant said that she misunderstood a question in the benefit application and mistakenly said that she was not able to work. She said that she made this mistake with the help of a Commission agent. She goes on to explain that she had been physically capable of returning to work but that she did not return to work because she needed to support her sick son.

[16] The Claimant seems to be arguing that that she would have been entitled to regular benefits if only the General Division had accepted that she was physically capable of returning to work.

² This is a plain language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act*.

³ See *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; *Ingram v Canada (Attorney General)*, 2017 FC 259.

⁴ See section 18(1)(a) of the *Employment Insurance Act*.

[17] Regardless of how the Claimant completed her original application or why she did so, it looks like both the General Division and the Commission understood her to be saying that she was physically capable of working. The Claimant clarified this to the Commission in a March 3, 2022, conversation.⁵ The General Division decision also refers to her evidence that she was physically capable of working.⁶

[18] However, the General Division did not make an explicit finding as to whether or not the Claimant was physically capable of working. Instead, its decision focused on the Claimant's availability.

[19] The General Division found that the Claimant was not available for work. It did so by considering all three factors of the legal test for availability described by the Federal Court of Appeal.⁷

[20] On the first factor, the General Division found that the Claimant had a desire to return to work. However, it found against her on the second and third factors. It found that she had not made efforts to find a job and that she had placed personal conditions on her return to work that unduly restricted her chances of returning to employment. Because of these findings, the General Division determined that she was "not available for work" within the meaning of the *Employment Insurance Act*.

[21] To identify an arguable case that the General Division made an error of fact, I need to find that the General Division may have **based its decision** on a finding of fact that ignored or misunderstood the evidence.⁸

[22] The General Division could have decided that the Claimant was not entitled to regular benefits if it found that she was not capable of work. However, it did not find that she was not capable of work.

⁵ See GD3-31.

⁶ See paragraph 19 of the General Division decision.

⁷ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

⁸ See section 58(1)(c) of the *Department of Employment and Social Development Act*.

[23] Instead, the General Division found that the Claimant was not entitled to benefits because she was not available for work. Once it found that she was not available, it did not need to find that she was not capable of work too. A claimant who is not available for work is not entitled to regular benefits regardless of whether the claimant is capable of work.

[24] I appreciate that the Claimant believes there was a mix-up around her physical capability to work. However, she has not pointed to any piece of mishandled evidence related to the General Division's finding on her *availability*. The Claimant's own testimony supported the General Division's finding that she was not available. She testified that she could not leave her son alone because he required 24/7 care. There is additional evidence in the record of a conversation on March 3, 2022, in which she told the Commission that she was not available after March 28, 2021, because she needed to care for her son full-time.

[25] Even so, the Federal Court has directed the Appeal Division to look beyond the stated grounds of appeal.⁹ Therefore, I have searched the appeal record for an arguable case that the General Division made an error by missing or misunderstanding any other evidence.

[26] I have not found anything that would support an arguable case that the General Division made an important error of fact.

Conclusion

[27] I am refusing leave to appeal. This means that the appeal will not proceed.

Stephen Bergen
Member, Appeal Division

⁹ See *Karadeolian v Canada (Attorney General)*, 2016 FC 615.