Citation: *P. S. v. Canada Employment Insurance Commission,* 2014 SSTGDEI 19

Appeal #: GE-14-785

BETWEEN:

P. S.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER:	Eleni Palantzas
HEARING DATE:	March 24, 2014
TYPE OF HEARING:	Teleconference
DECISION:	Appeal is dismissed

PERSONS IN ATTENDANCE

The Claimant, Ms. P. S. and Mr. J. F. participated in the hearing by telephone. Mr. F. indicated that he is the Claimant's uncle and former practicing lawyer who called in from Florida, USA to act as a witness.

DECISION

[1] The Member finds that the Claimant is not entitled to benefits pursuant to section 23.2 of the *Employment Insurance Act* (EI Act) and 41.4 and 41.5 of the *Employment Insurance Regulations* (Regulations).

INTRODUCTION

[2] On November 22, 2013, the Claimant applied to renew her claim for benefits for parents of critically ill children in order to care for her daughter.

[3] On December 2, 2013, the Commission advised the Claimant that benefits could not be paid because her child did not meet the definition of a critically ill or injured child as defined in the Regulations.

[4] On December 23, 2013, the Claimant requested that the Commission reconsider its decision and on January 24, 2014, the Commission maintained its decision. On February 18, 2014, the Claimant appealed to the General Division of the Social Security Tribunal (Tribunal).

FORM OF HEARING

[5] After reviewing the evidence and submissions of the parties to the appeal, the Member decided to hold the hearing by way of telephone conference for reasons provided in the Notice of Hearing dated March 11, 2014

ISSUE

[6] Whether the Claimant is the parent of a critically ill child within the meaning of subsection 23.2 of the EI Act and sections 41.4 and 41.5 of the Regulations.

THE LAW

[7] Subsection 23.2(1) of the EI Act stipulates that, despite section 18, but subject to this section, benefits are payable to a major attachment claimant, who is the parent of a critically ill child, in order to care for or support that child if a specialist medical doctor has issued a certificate that

> (a) states that the child is a critically ill child and requires the care or support of one or more of their parents; and
>
> (b) sets out the period during which the child requires that care or support.

[8] Subsection 23.2(2) of the EI Act stipulates that in the circumstances set out in the regulations, the certificate referred to in subsection (1) may be issued by a member of a prescribed class of medical practitioners.

[9] Subsection 41.4(1) of the Regulations stipulates that a 'critically ill child' is a person who is under 18 years of age on the day on which the period referred to in subsection 23.2(3) or (4) or 152.061(3) or (4) of the Act begins, whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury.

[10] Subsection 41.4(2) of the Regulations stipulates that for the purposes of subsections 23.2(1) and 152.061(1) of the Act,

> (a) a 'parent' is a person who, in law, is a parent (including an adoptive parent) of a critically ill child, has the custody of or, in Quebec, parental authority over the child, or is the guardian of the child or, in Quebec, the tutor to the person of the child, or a person with whom the child is placed for the purposes of adoption under the laws governing adoption in the province in which the person resides; and
>
> (b) a 'specialist medical doctor' is a medical doctor who is licensed to practice medicine in Canada as a specialist.

[11] Subsection 41.5(1) of the Regulations stipulates that ‘care’ is all care that is required because of a critically ill child’s state of health, other than the care provided by a health care professional.

[12] Subsection 41.5(2) of the Regulations stipulates that ‘support’ is all psychological or emotional support that is required because of a critically ill child’s state of health.

EVIDENCE

[13] On November 22, 2013, applied for benefits for parents of critically ill children. She indicated that her 12 year old daughter, S. F., requires her care and support however; she is not critically ill (GD3-4). She has taken a leave of absence from her employment since November 1, 2013 (GD3-14).

[14] The Medical documentation submitted includes:

(a) Dr. Lucas Murnaghan, Orthopaedic Surgeon, dated November 25, 2013 indicated that the patient’s (the Claimant’s daughter’s) life is not at risk as a result of the illness/injury; there was a significant change in her baseline health; she requires care or support by her parents until February 28, 2014 which may change with progress (GD3-16 to GD3-18). On February 13, 2013, he explained the progression of the patient’s condition and subsequent rehabilitation. He indicated the importance of the Claimant’s and her husband’s support to their daughter’s (his patient) recovery (GD2-10 & GD2-11).

(b) Dr. Jonathan Tolkin, Paediatrician and Orthopaedic and Development Rehab (SODR), indicated that the Claimant’s daughter is diagnosed with chronic pain syndrome and lower limb compartment syndrome as a complication of knee surgery. She requires a wheel chair for ambulation and help for most of her activities of daily living (GD2-19). He indicates that the Claimant’s daughter is an inpatient at Holland Bloorview Kids Rehabilitation Hospital and that it was vital that her mother (the Claimant) be at her bedside to help with the majority of her medical care and rehabilitation (GD2-15).

(c) Dr. Lisa Isaac, Anesthesiology and Pain Medicine, indicated that the Claimant's presence during the patient's unquestionably challenging period has been critical given the severity of her daughter's injury and rehabilitation requirements (GD2-12). An email from the doctor outlined the patient's treatments and medications and provided recommendations for the patient's ongoing medical treatment (GD2-13 & GD2-14).

(d) A list of medications (GD5-22 & GD5-23) and the patient's fasciotomy photos (GD5-20 & GD5-21)

[15] On December 2, 2013 and on January 24, 2014, the Commission advised the Claimant that she is not eligible for employment insurance benefits for parents of critically ill children because her child does not meet the definition of a critically ill child pursuant to the Regulations (GD3-19).

[16] In her written submissions, the Claimant indicates that as a result of routine arthroscopic knee surgery on November 1, 2013 to correct a dislocating knee cap, she had "horrific complications" (compartment syndrome) where amputation of her leg was a real possibility. Her daughter's baseline health has changed significantly after many surgeries and while her leg was saved, there is serious nerve and muscle damage, and her prognosis is unknown. She requires the Claimant's full-time care and support noting that her daughter requires a wheelchair for mobility, is undergoing difficult and painful rehabilitation and is on pain medications. The Claimant indicated that this has been catastrophic for her family in many ways, including financially. The Claimant writes that she understands that the legislation is new however questions whether the Tribunal will apply it narrowly or whether it will allow for a broader application in extreme cases. The Claimant understands that she must address the requirement of the Regulations specifically, "life is at risk as result of an illness or injury" in order for her appeal to be successful. She submits that the damage her daughter has suffered is extreme. She requests that discretion be exercised in her favour (GD2-6, GD2-20, GD5-5 to GD5-8).

[17] The Claimant submits a letter from the Social Worker at Holland Bloorview Kids Rehabilitation Hospital that attests to the tremendous stress that the Claimant has endured as a result of her daughter's daily care needs. She noted that the Claimant is having problems concentrating, is exhausted and is overwhelmed thus, would find it very challenging to work and is seeking assistance to decrease her stress by meeting with the Social Worker (GD2-16).

[18] The Claimant's Member of Parliament submitted a letter of support for the Claimant's application for benefits given the seriousness of her daughter's condition. She noted that although this situation may not meet the specific criteria of "life threatening" it was still severe and her case warrants a reevaluation (GD5-16).

[19] At the hearing, the Claimant reiterated the seriousness of her daughter's condition noting that she had to endure 6 surgeries and open wounds for months. She stated that it was very dangerous and she risked potential infection and amputation of her leg. The Claimant stated that although her prognosis is still unknown given the nerve damage, she is back to school wearing a brace, still doing physiotherapy and may need other devices. The Claimant testified that she objects primarily to the Commission's narrow application of the definition of "critically ill". She provided the analogy of how "legally dead" is measured and interpreted differently from province to province. As such, the definition for a 'critically ill' child could be interpreted and applied more broadly.

[20] The Member asked the Claimant whether the specialist ever said to her that her daughter's life was at risk. The Claimant stated "No, he did not".

[21] The witness, Mr. F., testified that the family has endured a great deal from what was to be routine surgery. He stated that although he understands that the definition of the child being 'critically ill' includes whether the child's 'life is at risk', a doctor, especially the surgeon, would not answer 'yes' or 'no' to this question because it is not in his best interest to do so because of malpractice considerations. He stated that a doctor can respond to questions regarding treatments but would be unwilling to respond to whether one's life is at risk. He stated that what they are asking is that caring for a

‘critically ill’ child whose ‘life is at risk’ should include caring for a ‘gravely ill’ child. Mr. F. pointed to the Commission’s representations and its reference to the case law therein (specifically, Granger v. Canada) and argued that although he would agree that the ‘Board’ cannot change or amend the law it can certainly interpret the law (GD4-3). He suggested that the Tribunal apply the ‘plain language’ interpretation of the law.

SUBMISSIONS

[22] The Claimant submitted that:

a) in appropriate, severe cases, the Tribunal can read "life is at risk" to include cases such as her daughter’s case; it is not in the best interest of the specialist who is performing the surgery, to indicate that the patient’s (her daughter’s) life is at risk. The definition of ‘critically ill’ should be broadened to include a ‘gravely ill’ child.

b) her daughter’s baseline health has significantly changed.

c) she is required for the full-time support and care of her daughter.

[23] The Respondent submitted that:

a) the Claimant has not proven her entitlement to benefits for parents of critically ill children because the claimant’s daughter did not meet the definition of a critically ill child pursuant to section 23.2 of the EI Act and 41.4 and 41.5.of the Regulations.

ANALYSIS

[24] Recently, the EI Act was amended to create a new employment insurance benefit that provides temporary income support to parents of critically ill children who take leave from work in order to provide care or support to their critically ill or injured child or children. Section 23.2 of the EI Act is clear and stipulates that claimants requesting

such benefits must provide a medical certificate from a specialist medical doctor who attests that the child is critically ill or injured and requires the care or support of his/her parents and indicates how long the care or support is required.

[25] For further clarification, subsection 41.4(1) of the Regulations defines a 'critically ill child' as a person who is under 18 years of age whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury. The Regulations also define what is meant by a 'parent', 'specialist medical doctor', 'care' and 'support' in subsection 41.4(2) and section 41.5 respectively.

[26] The Member first considered that as with other employment insurance benefits, the onus is on the Claimant to prove her entitlement to these benefits. In this case, the Claimant has provided medical documentation, photos, witness testimony and compelling written statements that attest to the seriousness of her daughter's condition, ongoing treatments and physical limitations. It is undisputed evidence that the Claimant's daughter required her full attention, care and support. The Member acknowledges and understands the necessity of the Claimant having to take leave from her employment in order to provide that support to her daughter.

[27] In order to qualify for these benefits however, the Claimant must also prove that her daughter is a 'critically ill child' pursuant to subsection 41.4(1) of the Regulations. The Member considered the Claimant's submission that the Commission applied this legislation in a very 'narrow' way and requests that the Member allow for a broader application of this new law. She submits that in extreme cases, "life is at risk" can be read to include circumstances such as those in her daughter's case. She submitted that the definition of a 'critically ill child' should include a 'gravely ill child'. At the hearing, it was noted by the Claimant's witness that it is not in the best interest of the specialist doctor who is performing the surgery, to indicate in a medical certificate that the patient's life is at risk.

[28] The Member considered however, that it is not within the Member's jurisdiction or discretion to ignore or change the legislation as it is presently written. In this case, the Member finds that it cannot ignore the clear, prescribed requirements of section 23.2 of

the EI Act and sections 41.4 and 41.5 of the Regulations, or change them to include ‘a gravely ill child’ as the Claimant submitted. The Member is supported by the Supreme Court of Canada’s consistent ruling, which stands for the principle that “a judge is bound by the law. He cannot refuse to apply it, even on grounds of equity” (Granger v. Canada (CEIC), [1989] 1 S.C.R. 141, paragraph 9).

[29] Further, the Member also considered what the courts have long held with respect to statutory interpretation. The Supreme Court of Canada has often referred to Driedger’s ‘Modern Principle’ which states that statutory interpretation cannot be founded on the wording of the legislation alone. This principle provides that:

> “Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.” (Rizzo & Rizzo Shoes Ltd., (1998)1 S.C.R. 27, at paragraph 21)

[30] The Member finds that to interpret the requirements of subsection 23.2(1) of the EI Act and subsection 41.4(1) of the Regulations in their simple, grammatical and ordinary sense is consistent with both the intent of the EI Act and that of Parliament. For instance, the fact that only a ‘specialist’ medical doctor could provide a medical certificate is not accidental, but an intended legislative requirement. Similarly, to interpret subsection 23.2(1) of the EI Act and subsection 41.4(1) of the Regulations, to include parents of a gravely ill child where there is no risk to the child’s life, would ignore the clear requirements of the legislation and the grammatical and ordinary sense of the language. To do so, would not be consistent with the ‘Modern Principle’ of legislative interpretation. Further, the Member finds that to read this legislation in its simple and ordinary sense, does not lead to an absurd result, but to the intended consequence of disentitlement when a Claimant is unable to prove, in the manner prescribed in subsection 23.2(1) of the EI Act, that he/she is a parent of a critically ill child.

[31] In this case, the Claimant was unable to provide a medical certificate, from any of the specialists caring for her daughter that would attest that her daughter's life was at risk. On the contrary, the specialist's medical certificate indicated that although the Claimant's daughter's baseline health was significantly changed, her life was not at risk (GD3-16). The Claimant herself, in her initial application indicated that her daughter is not critically ill (GD3-4). Further, at the hearing, the Claimant testified that at no time did the specialist ever tell her that her daughter's life was at risk. The Member therefore, finds that although the Claimant's daughter's health was significantly changed, her life was not at risk. The Member finds that Claimant's daughter is not a 'critically ill child' pursuant to subsection 41.4(1) of the Regulations.

[32] The Member is sympathetic to the Claimant's plea and understands both the emotional and financial hardship that she has endured however; she is not entitled to benefits for parents of critically ill children pursuant to section 23.2 of the EI Act and sections 41.4 and 41.5 of the Regulations.

CONCLUSION

[33] The appeal is dismissed.

Eleni Palantzas
Member, General Division

DATED: March 31, 2014