

Citation: *C. T. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 124

Appeal #: GE-14-1020

BETWEEN:

C. T.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Katherine Wallocha

HEARING DATE: October 21, 2014

TYPE OF HEARING: Teleconference

DECISION: Appeal Allowed

PERSONS IN ATTENDANCE

C. T., the claimant, attended the hearing via teleconference.

DECISION

[1] The Tribunal finds that the claimant has not proven availability for the period of November 11, 2013 to February 13, 2014 in accordance with paragraph 18(1)(a) of the *Employment Insurance Act* (EI Act). The claimant has proven available from March 15, 2014 in accordance with paragraph 18(1)(a) of the EI Act.

INTRODUCTION

[2] The claimant became unemployed on July 26, 2013. She reactivated a claim for Employment Insurance (EI) benefits on September 30, 2013. A claim for EI sickness benefits was re-established on September 29, 2013 however her benefit period expired on November 3, 2013. She applied again for regular EI benefits on November 18, 2013. The Canada Employment Insurance Commission (Commission), after speaking with the claimant, allowed the claim for EI sickness benefits until January 4, 2014. The claimant submitted further medical evidence to support incapacity until October 1, 2014 however, her 15 weeks of sickness benefits ended on March 10, 2014 and a request to convert her claim to regular EI benefits was denied because the claimant was not capable of proving her availability. The claimant sought reconsideration of the Commission's decision, which the Commission maintained in their letter dated April 17, 2014. The claimant appealed to the Social Security Tribunal (SST).

FORM OF HEARING

[3] The hearing of this appeal was by teleconference for the reasons given in the Notice of Hearing dated September 9, 2014.

ISSUE

[4] The issue under appeal is whether the claimant has proven that she was available for work in accordance with paragraph 18(1)(a) of the EI Act.

THE LAW

[5] Paragraph 18(1)(a) of the EI Act provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to obtain suitable employment.

EVIDENCE

[6] The evidence in the docket is as follows:

- a) The payment history for this claim shows that the claimant received regular benefits from October 21, 2012 to March 16, 2013 (GD3-35).
- b) The claimant reactivated her claim on September 30, 2013 stating that she voluntarily left her employment for health or medical reasons. She stated that her doctor did not want her working to begin with because she was under a lot of stress and she is on a list for hip replacement surgery. She worked because she needs the money but was in a lot of pain sitting for too long at her desk and the job was too stressful for her. She was asked to stay at her desk at all times and she was required to go up and down stairs which was hard for her (Pages GD3-16 to GD3-27).
- c) The claimant submitted a medical certificate dated October 3, 2013 and signed by her doctor stating that the claimant was incapable of working until January 2, 2014 because she is awaiting hip replacement (Page GD3-30).
- d) The claimant was contacted by the Commission and she stated that she cannot sit or stand for long periods. She was explained that to be on regular benefits she needs to

be capable of working and it does not seem like she is. She was explained sickness benefits and the claimant said that is what she is requesting (Page GD3-31).

- e) The Commission sent a letter dated November 7, 2013 informing the claimant that she has been approved EI sickness benefits from September 29, 2013 to November 9, 2013. The claimant was informed that if she was still unable to work after the end of this period, she will have to provide additional medical evidence (Page GD3-32).
- f) An Attestation Certificate shows that the claim ended in the week of November 3, 2013 because her benefit period ended (Page GD3-33).
- g) The claimant submitted a new application for EI benefits on November 18, 2013. She was contacted by the Commission and it was determined that she was applying for sickness benefits as her medical note already on file would be sufficient to qualify her for sickness benefits until January 4, 2014. The claimant was told that her claim would be converted to sickness benefits with a recovery date of January 4, 2014 and if she needs additional weeks of sickness benefits, she will need to submit a medical note. She was further instructed that if her doctor is allowing her to return to work then she would need to submit a doctor's note with her ability to do that. She was advised that her already submitted reports would be amended so that they are considered sick weeks (Page GD3-53).
- h) The claimant was sent a letter by the Commission dated December 13, 2013 informing her that she has been approved EI sickness benefits from November 10, 2013 to January 4, 2014 (Page GD3-54).
- i) The claimant submitted a medical certificate dated December 16, 2013 indicating that she is incapable of working until October 1, 2014 (Page GD3-56).
- j) The claimant contacted the Commission on January 27, 2014 and informed them that she will be in the hospital. She was informed that she had only been paid eight weeks of sickness benefits and is able to receive up to 15 weeks. She will have been paid the full 15 weeks of sickness benefits in March 2014 (Page GD3- 57).

- k) The claimant submitted a letter dated February 10, 2014 because she did not know who to talk to or where to turn. She stated that she is 54 years old, suffering from Osteoarthritis and needs both her hips replaced. Her doctor put her on medical leave so she started a medical claim. She stated that she got a call from the Commission saying that she should be looking for work and then they put her on regular benefits. Then she received a call from the Commission telling her that she should not be looking for work as her doctor's note stated she was waiting for hip replacement. She continued to look for something that she could do because she is having problems paying all her bill plus feeding her and her son. She needs to get her surgery over with and properly recover. She submitted an outline of her monthly expenses (Pages GD3-58 to GD3-60).
- l) The Commission informed the claimant by letter dated March 27, 2014 that they could no longer pay her EI benefits from March 10, 2014 because information on file showed that she was not yet physically capable of working therefore she had not proven her availability (Page GD3-61).
- m) The claimant submitted her Request for Reconsideration stating that she would like her medical claim changed to regular benefits up until she actually had the surgery. She added that she should have been on a regular claim, and then switched to medical when she had surgery as now she is trying to recover and cut off EI benefits (Page GD3-62).
- n) The claimant submitted a letter dated March 18, 2014 stating that her doctor told her that she should not be doing that type of work where she is sitting all day until she gets a hip replacement. While she was originally on medical claim she continued to look for work that maybe she could do that did not require sitting all day. There have been so many mix ups from the beginning and now she has been cut-off her EI benefits after four months as they said she received the maximum amount of sickness benefits. She should have been left on a regular claim until her surgery and then put on a medical claim so that she can have some time to recover before she has to look for a job (Page GD3-64).

- o) The claimant submitted a letter signed by her doctor dated March 31, 2014 stating that the claimant was able to work from November 11, 2013 to February 13, 2014; she was just not to sit for eight hours due to osteoarthritis pain. She went for hip replacement surgery on February 14, 2014 and is in recovery at the present time. Her surgeon told her that she would be able to return to a job or to be re- trained to do something that does not require sitting for an eight hour shift (Page GD3-65).
- p) The claimant submitted a job search of all the jobs she applied to from October 2012 to March 2014 indicating only the company name, the position applied for and occasionally a contact number or email address (Pages GD3-68 to GD3-75).
- q) The Commission contacted four employers at random on April 7, 2014 to confirm the claimant's job search efforts. The employer from the first page stated that the claimant recently applied and was interviewed on April 3, 2014. The employer from the third page of the job search stated that the claimant applied in December 2012 and was not offered the job at that time. The employer from page four stated that the job was posted last week and the company normally submits job postings in March but not between November and February when the claimant contends that she was looking for work. The employer from page 8 of the job search stated that he could not find the claimant's name in the system so he was not sure when or if she applied (Page GD3-76).
- r) The claimant was contacted by the Commission and advised that her job list was reviewed and it could not be verified that she was looking for work during the period in question. The claimant stated that her surgeon agreed that she could work at that time from November 2013 to February 2014. She was reminded that she submitted two medical certificates that both stated incapacity for that period. The claimant stated that that was a mistake and she was following the direction of what she was being told to do. She was asked to submit a note from her doctor or surgeon to confirm she is able to return to work and if there are any restrictions. This information will be reviewed to determine if she is entitled to regular benefits after

her medical benefits were paid in full however; there will be no change to the prior period from November 2013 to February 2014 (Page GD3- 77).

- s) The claimant submitted a note from her Surgeon dated April 16, 2014 which confirmed that the claimant underwent total hip replacement on February 14, 2014 and will be required to be off work until May 15, 2014 for her recovery and rehabilitation (Page GD3-89).
- t) The Commission sent a letter dated April 17, 2014 informing the claimant that she was incapable of working between the period of November 11, 2013 to February 13, 2014 therefore no regular benefits were payable during this period (Page GD3-90).
- u) The claimant submitted another doctor's note dated April 22, 2014 indicating that she was able to work from November 2013 to February 2014 but not able to do desk work. Medical EI should start February 14, 2014 and end when the surgeon feels she is able to return to work in May 2014 (Page GD3-91).
- v) The claimant submitted another note from her surgeon dated April 22, 2014 indicating that the claimant underwent total hip replacement surgery on February 14, 2014 and will be required to be off work until March 15, 2015 for her recovery and rehabilitation. This is an amended note as the original note should have said March 15, 2014 and not May 15, 2014 (Page GD2B-10).
- w) The claimant submitted a job search history for March and April 2014 indicating the employer, address, phone, position applied for, contact person and date of contact. She highlighted the ones in which she had an interview and circled those she contacted in March 2014 (Pages GD2B-5 to GD2B-7).
- x) The Commission submitted the payment history for the claimant which indicated that she was paid 15 weeks of sickness benefits from November 10, 2013 to March 8, 2014. She was paid regular benefits starting April 12, 2014 (Page GD3- 93).
- y) The claimant submitted her Notice of Appeal to the SST stating that she was originally put on a medical EI because she could no longer sit for more than four

hours per day in her job as a receptionist. In the meantime, she was still trying to find a job where she may work. Now she has had surgery and needs three months to recover. She feels she should have been on regular EI then switched to medical EI after her surgery. Someone messed this up and now she has no income and no re-training and no job to go to but she still has not recovered and cannot drive yet (Page GD2-2).

[7] The evidence at the hearing is as follows:

- a) The claimant testified that her family doctor provided her with two medical certificates but the doctor made errors on these notes. The claimant stated that the doctor told her she could work but not at a desk all day because she was awaiting hip replacement surgery and she was in a lot of pain. She received a doctor's note which stated that she would be able to return to work on January 2, 2014 but the doctor does not know why she put that date. The doctor then rewrote the medical certificate but indicated that she would not be able to work until October 2014. When the doctor wrote the first note, she did not even know when her surgery would be and the second note, the doctor said she did not know what to put. The claimant further stated that her doctor wrote a letter explaining that she had made an error.
- b) The claimant explained that she did not reactivate her claim right away because she was looking for something else and she thought that because she left her job she was not capable of receiving EI benefits.
- c) The claimant stated that she completed the Quit – medical/health reasons questionnaire because she was told to do that. At that point she did not even know there was a medical EI. At the beginning of her claim they put her on sickness benefits. She spoke with someone at EI (Page GD3-31) who told her that she should be on regular EI until she goes into the hospital and she responded that that makes sense. The claimant was asked to clarify because the Commission's notes state that she should be on sickness benefits. The claimant stated that the Commission's agent said, which she did not put in the notes, that maybe there was something that she

could do that did not require her to be sitting at a desk all day and even her doctor agreed.

- d) The claimant stated that she provided proof that she was available and looking for work. She stated that she began looking for work a week after her surgery and attended interviews while on crutches and staples in the side of her leg. She stated that the letter from the Commission said that she failed to prove that she was capable and available for work in March 2014 but she sent in letters and interviews that she had with places and the names of people she had spoken to. Her doctors submitted letters stating that she was capable of working in March. She was quite capable of doing something maybe part-time.
- e) The claimant stated that she was on morphine for four months starting in October 2013 until February 2014 and although she was looking for work she was spaced right out. She stated that she was capable of working or doing something while she was on morphine as long as she was not sitting all day or going up and down stairs.
- f) The claimant confirmed that she was informed that her EI claim would end in March 2014 and stated that that is the reason she went looking for work a week after she was out of the hospital.
- g) The claimant explained that she supplied her job search history showing that she was actively looking for work from October 2012 to March 2014. When asked to show which places she applied in November and December 2013 and January and February 2014, she stated that it is all in there. When asked to identify specific places she was unable.
- h) The claimant explained that GD2B-5 and GD2B-6 show that she was looking for work in March and April 2014. She stated that she was allowed regular benefits at the end of March 2014. She did not receive any benefits for March 2014 and that is what she is concerned with. The claimant confirmed that she applied mainly for receptionist jobs during this timeframe which would require her to sit all day and she added that she applied online.

- i) The claimant explained that her doctor had made an error but then she corrected that error. She went a whole month without EI and had to borrow money to live on. She managed to find a three month contract job in May 2014 and has since found a full-time job that allows her stand up and walk around and stretch.

SUBMISSIONS

[8] The claimant submitted that:

- a) She should have been on a regular claim until her surgery of February 14, 2014 and then medical claim until March 15, 2014 when her surgeon said she could find work and this is when she should have been switched back to a regular claim. She provided the Commission with a job search but the representative did not call the employers who she actually talked with and only called the ones she applied to on-line and therefore he denied changing her claim from regular to medical and she did not get any money for the whole month of March 2014. She believes that it was not her fault that errors were made on her claim and the doctors not knowing what dates to put on the medical notes or what to write on them (Pages GD2A-5 and GD2A-6).
- b) The claimant testified that the only thing she is arguing is why she did not get any benefits for March 2014. She does not care about reversing the regular EI to sickness EI. She stated that she was looking for work and going to interviews immediately after her surgery. She stated that if she had known that her EI was going to run out a week after her surgery she would not have gone for the surgery.
- c) The doctors made errors on her medical notes and her EI claim was done wrong. She believes she was entitled to receive benefits and was denied them (Page GD2A-2).
- d) This is very unfair. She is a single mother and she is having a difficult time supporting her and her son. This is causing a lot of grief and her healing is not going well because of it.

[9] The Respondent submitted that:

- a) The Commission determined that the claimant had not demonstrated that she was available and capable of working for the period of November 11, 2013 to February 13, 2014 (Page GD4-3).
- b) The claimant was paid the correct benefits (medical) based upon the information she provided. Although the claimant contends that the medical certificates completed by her doctor were done so in error, she has not provided a reasonable explanation as to why she submitted this information to the Commission. The claimant was given ample opportunity to enquire about the types of benefits she was entitled to and when she was presented with her two options and she chose to convert her claim to medical benefits which was supported by her medical certificates (Page GD4-4).
- c) The claimant spoke with two separate agents about the difference between medical benefits and regular benefits. Furthermore, she submitted two medical certificates to support that she was not capable of working during the period in question. Given these circumstances, the Commission maintains that the claimant is not entitled to regular benefits between November 11, 2013 and February 13, 2014 (Page GD4-5).

ANALYSIS

[10] In order to show availability, the claimant must demonstrate that there is a desire to return to the labour market, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might unduly limit the chances of returning to the labour market (**Faucher A-56-96**).

[11] The issue before the Tribunal is whether or not the claimant has proven her availability for work in order to receive regular benefits. The original letter denying the claimant regular EI benefits states that the Commission is unable to pay EI benefits from March 10, 2014, while the letter maintaining the decision following the Request for Reconsideration states that the claimant was incapable of working between the period of

November 11, 2013 to February 13, 2014. The Tribunal will consider the claimant's availability for both periods.

[12] The claimant quit her job because she found sitting at her desk for extended periods of time was too painful. She eventually applied to reactivate an existing claim and completed the questionnaire for voluntary leaving due to health reasons. She provided a medical certificate signed by her doctor stating that she was unable to work until January 2, 2014. When that certificate was to expire, she submitted another medical note indicating that she would be off work until October 1, 2014. The Tribunal accepts that the claimant was confused as to which EI benefits she should be applying for however, she was provided with explanations on several occasions and on several occasions she agreed that she should be receiving sickness benefits.

[13] Originally the claimant requested that her EI sickness benefits be converted to regular EI benefits until she had her surgery and then she requested that she receive sickness benefits allowing her the opportunity to recover. The claimant provided a job search history but this history was eight pages and was dated from October 2012 to March 2014. When she was asked to identify the employers that she contacted during the period of November 2013 to February 2014 she was unable.

[14] In the Federal Court of Appeal (FCA) decision **Leblanc (2010 FCA 60)** Justice Pelletier explains:

“The Umpire relied on that concession to intervene and allow the appeal, without considering the issue of whether, notwithstanding his desire to get to work, the claimant was not available within the meaning of the Act because of obstacles preventing him from coming in to work. On this point, we affirm and adopt the comments of Umpire Forget in *Sarkis*, **CUB 25057**:

While availability implies that a person is motivated by a sincere desire to work, willingness to work is not in itself necessarily synonymous with availability. In order to decide whether or not an individual is available for work, one must determine whether that individual is struggling with obstacles that are

undermining his or her will to work. By obstacle, we mean any constraint of a nature to deprive someone of his or her free choice, such as family obligations or a lessening of the individual's physical strength. It goes without saying that a person may not be regarded as available when that person admits to not being available or is in a situation that prevents him or her from being available. Payment of benefit is subject to the availability of a person, not to the justification of his or her unavailability. Consequently, the mitigating circumstances and the sympathy one may feel for the claimant cannot shorten the period of disentitlement.”

[15] In this case, while the claimant might have been looking for work online, the Tribunal finds that she was not in a position to accept employment due to the severe pain she was suffering. She quit her employment because of the pain she was experiencing and she was awaiting hip replacement surgery. She had also placed restrictions on the job she was willing to accept. For these reasons, the Tribunal finds that the claimant was not available for work during the period of November 11, 2013 to February 13, 2014.

[16] However, during the hearing the claimant stated that she was no longer interested in reversing her EI sickness benefits to regular benefits before her surgery. Instead she is arguing that she was available for work starting March 15, 2014.

[17] The claimant's surgeon submitted a doctor's note indicating that she was available for work effective March 15, 2014 and the claimant submitted a job search history indicating that she was in fact, looking for work in March and April 2014. The Commission contacted employers from a different job search history but the first employer contacted confirmed that the claimant did have an interview on April 3, 2014. The claimant testified that she secured a three month contract job in May 2014.

[18] While the claimant stated that she needed three months to recover from her surgery, she was unable to do so because she needed to work and support her family. The Tribunal finds that the claimant had a desire to return to the labour market, made efforts to find suitable employment and placed no restrictions on her employment search.

[19] For these reasons, the Tribunal finds that the claimant was available and actively and seriously seeking employment effective March 15, 2014.

CONCLUSION

[20] The appeal is allowed.

K. Wallocha

Member, General Division

DATED: October 24, 2014