[TRANSLATION]

Citation: *D. B. v. Canada Employment Insurance Commission*, 2015 SSTAD 838

Date: July 3, 2015

File number: AD-14-110

APPEAL DIVISION

Between:

D. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Hearing held by teleconference on June 30, 2015

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the case referred back to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a new member.

INTRODUCTION

[2] On December 11, 2013, the Tribunal's General Division found that:

- The denial of Employment Insurance sickness benefits under section 12(3)(*c*) of the *Employment Insurance Act* (the Act) was justified;
- The Appellant was required to pay back the benefits to which she was not entitled under section 43 of the Act.

[3] On January 14, 2014, the Appellant submitted an application for leave to appeal the General Division's decision to the Appeal Division. On February 3, 2015, the application for leave to appeal was granted.

TYPE OF HEARING

[4] The Tribunal determined that the appeal would be heard via teleconference for the following reasons:

- the complexity of the issue or issues;
- the fact that the parties' credibility was not one of the main issues;
- the cost-effectiveness and expediency of the hearing choice;
- the need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] The Appellant participated with her representative, Sylvain Bergeron. The Respondent, represented by Manon Richardson, also participated.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(c) the General Division based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUES

[7] The issues are as follows:

- Did the General Division err in fact and in law in finding that the denial of Employment Insurance sickness benefits under section 12(3)(*c*) of the Act was justified and that the Appellant was required to pay back the benefits to which she was not entitled under section 43 of the Act?

ARGUMENTS

[8] The Appellant's arguments in support of her appeal are as follows:

- The member of the General Division erred in his findings of fact and in his application of the Act when he refused to consider the medical certificate of September 10, 2013, which was much more detailed;

- Of course he mentions the medical certificate in the “Evidence at the Hearing” section, but in his analysis, he completely disregards it;

- In his analysis, the member never considered the errors mentioned in the interview transcripts, or the fact that, under the case law and the rules of natural justice, the interview transcript not signed by the claimant is only hearsay that can be rebutted by the claimant’s direct testimony;
  The member of the General Division does not refer to the documents submitted or to the case law, suggesting that he dismissed them without analysis.

[9] The Respondent’s arguments against the Appellant’s appeal are as follows:

- The General Division did not err either in fact or in law and it properly exercised its jurisdiction;

- According to the evidence in the docket, the General Division Tribunal did not dismiss any evidence. However, the Respondent did not receive a copy of the medical certificate submitted at the hearing;

- For quite some time, the case law has consistently stated that unless there are particular circumstances that are obvious, the issue of credibility must be left to the discretion of the member of the General Division. The Appeal Division must intervene only if it is obvious that the General Division’s decision is unreasonable based on the facts brought before it to enable its decision;

- Unless the General Division failed to observe a principle of natural justice, erred in law, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, the Appeal Division must dismiss the appeal.

STANDARDS OF REVIEW

[10] The parties made no submissions to the Tribunal concerning the standard of judicial review applicable to the General Division's decision.

[11] The Tribunal notes that the Federal Court of Appeal has held that the standard of judicial review applicable to a decision of a Board of Referees or an Umpire on questions of law is correctness (*Martens v. Canada (AG)*, 2008 FCA 240) and that the standard of review applicable to questions of mixed fact and law is reasonableness (*Canada (AG) v. Hallée*, 2008 FCA 159).

ANALYSIS

[12] In its decision, the General Division did not consider the Appellant's new medical evidence that was filed at the hearing, namely a medical certificate dated September 10, 2013 (Exhibit AD4-2), which mentions that the Appellant suffers from fluctuating depressive symptoms. Of course the General Division mentions it in the "Evidence at the Hearing" section, but in its analysis, it completely disregards it.

[13] Moreover, in its decision, the General Division indicates that the Appellant provided no evidence of what she did to find a job. Yet, there is evidence in the docket of the steps taken by the Appellant to find a job (Exhibit GD3-13).

[14] When faced with evidence, the member cannot disregard it. The member must consider it. If he decides that the evidence should be dismissed or assigned little or no weight at all, he must explain the reasons for the decision (*Bellefleur v. Canada (AG)*, 2008 FCA 13, *Parks v. Canada (AG)*, A-321-97). In this case, the General Division failed to do so, and this is an error of law.

[15] For these reasons, the Tribunal refers the matter back to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a new member.

CONCLUSION

[16] For these reasons, the Tribunal allows the appeal and refers this case back to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a new member.

[17] The Tribunal orders that the General Division's decision dated December 11, 2013, be removed from the file.

Pierre Lafontaine
Member, Appeal Division