Citation: ***Canada Employment Insurance Commission v. J. A.*****, 2015 SSTAD 1091**

Date: September 15, 2015

File number: AD-13-1136

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

J. A.

Respondent

Decision by: Shu-Tai Cheng, Member, Appeal Division

Heard by Teleconference on August 24, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant Representative: Carol Robillard

Respondent: J. A.

INTRODUCTION

[1] On April 3, 2013, the Board of Referees allowed the claimant's appeal on sick benefits although the Commission had imposed a disentitlement pursuant to sections 50 of the *Employment Insurance Act* (Act) and section 40 of the *Employment Insurance Regulations* (EI Regulations).

[2] An application for leave to appeal the General Division decision was filed with the Appeal Division of the Tribunal on April 23, 2013 and leave to appeal was granted on April 20, 2015.

[3] This appeal proceeded by Teleconference for the following reasons:

a) The complexity of the issue(s) under appeal; and

b) The requirements under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] The Tribunal must decide whether to dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD 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, whether or not the error appears on the face of the record; or

c) the General Division 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.

[6] For our purposes, the decision of the Board of Referees (Board) is considered to be a decision of the General Division.

[7] Leave to appeal was granted on the basis that the Appellant had set out reasons which fall into the enumerated grounds of appeal and that at least one of the reasons had a reasonable chance of success, specifically, under paragraph 58(1)(b) and (c) of the DESD Act.

[8] Section 59(1) of the DESD Act sets out the powers of the Appeal Division. It states:

> The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

SUBMISSIONS

[9] The Appellant (Commission) submitted that the applicable standard of review for questions of law is correctness and the applicable standard of review for mixed questions of fact and law is reasonableness. Further, it argued that:

a) in order to prove inability to work, a medical note completed by a medical doctor or other medical professional, attesting to the claimant's inability to work and stating the probable duration of the illness, injury or quarantine, is required. The Board erred when it determined that the onus of proof was on the Commission who had failed to comply with contacting the medical professional;

b) the Board erred when it allowed the appeal on the basis that the claimant had a 'history of depression for which he was being treated' and allowed the appeal based on the claimant's credibility. The issue before the Board was that the claimant had not provided medical proof of this incapacity pursuant to section 40 of the EI Regulations to prove his statement. Furthermore, considering credibility in relation to health factors and job performance relates to the issue of voluntary leaving not entitlement to benefits under section 40; and

c) the Board has no authority to amend or interpret the requirements of the legislation.

[10] The Respondent submitted that he applied for sickness benefits because he suffered from depression and back pain. He stated that he explained everything to his doctor and does not know why his doctor did not write the specific dates that he was sick in the medical note. Also, he noted that he had to wait many weeks for an appointment and could not get a note until a long time after he first became ill.

STANDARD OF REVIEW

[11] As previously determined by the Federal Court of Appeal in *Canada (AG) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (AG)*, 2012 FCA 190 and other cases, the standard of review for questions of law and jurisdiction in employment insurance appeals is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

ANALYSIS

[12] At the hearing, the Commission stated the following:

a) when the Respondent filed his initial claim for sickness benefits, the medical note confirming incapacity stated the period of September 12 to 22, 2012;

b) no benefits were paid, at the initial claim, as the Respondent was serving the waiting period;

c) his renewal application was filed for the last day of work on October 12, 2012, which was not covered in the time period of the first medical note;

d) the next medical note provided by the Respondent's doctor mentioned depression and that the Respondent was unhappy with his work. It stated that if further information was required to contact the doctor;

e) the Commission determined that the Respondent had not proven incapacity and he was not entitled to benefits; and

f) the Respondent had not received any benefits, and there is no overpayment at issue in this case.

[13] The Respondent stated that he was satisfied with the explanation of the Commission and now understood the situation.

[14] The information and evidence to be provided by the claimant in order to prove inability to work is a medical note completed by a medical doctor or other medical professional, attesting to the claimant's inability to work and probable duration of the illness, injury or quarantine, as required: subsection 40(1) EI Regulations. The onus to provide this proof rests with the claimant (*Canada (AG) v. Faltermeier*, A-479-94, Federal Court of Appeal).

[15] The decision of the Board noted that:

> The doctor stated that his patient had lower back problems and invited enquiries of interested parties and the Commission researchers did not comply with any further enquiry on their part.

In so doing, the Board placed the onus of proof on the Commission to obtain medical information from the Respondent's doctor. This was an error in law, as the onus to prove inability to work rests with the Respondent.

[16] In addition, the issue before the Board was whether the Respondent had provided medical proof of incapacity sufficient to meet the requirements of section 40 of the EI Regulations. The Board allowed the appeal based on the Respondent's credibility, as follows:

> The Board was empowered that where health factors affected job performance, it was subject to credible explanations from the claimant, which it felt it received in this case.

However, considering credibility in relation to health factors and job performance properly relate to the issue of voluntary leaving and not to the issue of entitlement to benefits under section 40 of the EI Regulations (*Canada (AG) v. Bergeron*, 2011 FCA 284; *Caron v. Canada* (AG), 2003 FCA 254).

[17] As the Board erred in law in relation to the onus of proof and the effect of the Respondent's credibility in relation to the entitlement to sickness benefits, the standard of review applicable is that of correctness.

[18] The Board decision, in allowing the appeal based on these errors, was not correct.

[19] The correct decision would have been to dismiss the Respondent's appeal before the Board.

[20] Considering the submissions of the parties, my review of the Board's decision and the appeal file, and the teleconference hearing, I allow the appeal. Further, because this matter does not require new evidence or a hearing before the General Division, I am giving the decision that the Board should have given.

CONCLUSION

[21] The appeal is allowed.

Shu-Tai Cheng
Member, Appeal Division