



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *B. W. v. Canada Employment Insurance Commission*, 2016 SSTADEI 69

Date: February 7, 2016

File number: AD-15-448

APPEAL DIVISION

Between:

B. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

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

REASONS AND DECISION

INTRODUCTION

[1] On June 12, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal about payment of sickness benefits pursuant to subsection 18(b) of the *Employment Insurance Act* (EI Act) and section 40 of the *Employment Insurance Regulations*. The Canada Employment Insurance Commission (Commission) had determined that the Applicant had not provided medical evidence supporting her incapacity and the sickness benefits that she had received.

[2] The Applicant made a request for reconsideration, but the Commission maintained its decision in January 2015. This resulted in an overpayment for sickness benefits that the Applicant had received.

[3] A GD hearing was held by teleconference on June 11, 2015. The Applicant attended, but the Respondent did not.

[4] The GD determined that:

- a) The medical certificate provided by the Applicant's doctor stated that she had been on medical employment insurance from March 23 to July 12, 2014 for a back injury; it did not state that she was unable to work during the relevant period;
- b) The Applicant did not provide medical evidence to support her incapacity to work despite repeated requests and explanations from the Commission;
- c) She said at the GD hearing that she will not go back to her doctor to request another medical note and that she is giving up and will re-pay the overpayment; and
- d) The Applicant did not establish that she was unable to work because of illness, injury or quarantine pursuant to paragraph 18(1)(b) of the EI Act and that she would otherwise be available for work.

[5] The GD decision was sent to the Applicant under cover of a letter dated June 15, 2015.

[6] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on July 9, 2015, within the 30-day limit.

[7] On December 2, 2015, the Tribunal sent a letter to the Applicant with a request to provide submissions on whether leave should be granted or refused. In particular, the letter asked the Applicant for: reasons for the appeal and reasons why the AD should give permission to file an appeal. In addition, the Respondent was asked about the medical note which the Applicant had attached to the Application and to state whether and how it has an impact on the appeal.

[8] The deadline for response was December 29, 2015. Both parties filed written responses.

ISSUES

[9] The AD must decide if the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[10] Pursuant to subsections 57(1) and (2) of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the AD within 30 days after the day on which the decision appealed from was communicated to the appellant. Further, the AD may allow further time within which an application for leave is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant.

[11] According to subsections 56(1) and 58(3) of the DESD Act, “an appeal to the Appeal Division may only be brought if leave to appeal is granted” and “the Appeal Division must either grant or refuse leave to appeal.”

[12] Subsection 58(2) of the DESD Act provides that “leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.”

[13] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

- (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.

[14] Taking the Application and submissions of December 2015 together, the following summarizes the basis for the Applicant's appeal to the AD:

- a) The Applicant is appealing the GD decision on the basis that the GD failed to observe a principle of natural justice or refused to exercise its jurisdiction.

In particular:

- (1) The Applicant maintains that she attempted on three separate occasions to get Dr. G. to fill out the request forms, but the doctor continued to submit inadequate forms;
- (2) The Applicant was disheartened that her claim was rejected by the Commission and on the teleconference hearing with the GD Member, she stated that she was ready to quit (her appeal);
- (3) After the hearing, she went to her family doctor and received a proper medical certificate, a copy of which she attached to the Application; and
- (4) She believes that this will greatly impact the appeal decision.

[15] The Respondent's submissions state:

The Commission acknowledges the claimant has now provided proof of incapacity from May 11, 2014 to July 19, 2014. As this evidence was not before the SST-GD and therefore, not considered in the decision, there is no evidence the SST-GD failed to observe a principle of natural justice, exceeded its jurisdiction, erred in law or made an erroneous finding of fact. As such the Commission requests the SST deny leave to appeal. The Commission will become seized of the file and amend the disentitlement

for failing to prove incapacity to the period March 23, 2014 to May 9, 2014 and adjust the overpayment accordingly.

[16] The Applicant does not state how the GD is alleged to have erred. Her Application is based on a medical certificate that did not exist at the time of the GD hearing.

[17] Once leave to appeal has been granted, the role of the AD is to determine if a reviewable error set out in subsection 58(1) of the DESD Act has been made by the GD and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the AD to intervene. It is not the role of the AD to re-hear the case *de novo* or to assess or reweigh the evidence put before the GD. It is in this context that the AD must determine, at the leave to appeal stage, whether the appeal has a reasonable chance of success.

[18] I have read and considered the GD's decision and the record. There is no suggestion that the GD failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law or any erroneous findings of fact which the GD may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[19] In order to have a reasonable chance of success, the Applicant must explain how at least one reviewable error has been made by the GD. The Application is deficient in this regard, and I am satisfied that the appeal has no reasonable chance of success.

[20] There may be other avenues to have a new medical certificate reviewed at this stage of an appeal, such as an application to rescind or amend the GD decision, under section 66 of the DESD Act. However, an application to rescind or amend a decision must be made to the Division of the Tribunal which made the decision. In this case, the GD is the appropriate division of the Tribunal (and not the AD).

[21] Here, however, it appears that an application to rescind or amend is not necessary, given the Respondent's submissions. The Respondent has confirmed that, based on the new medical certificate provided by the Applicant, it will amend the disentitlement for failing to prove incapacity and adjust the overpayment accordingly.

CONCLUSION

[22] The Application is refused and the matter is to be reviewed by the Commission.

Shu-Tai Cheng
Member, Appeal Division