Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *G. W. v. Canada Employment Insurance Commission*, 2016 SSTADEI 182

Tribunal File Number: AD-15-1030

BETWEEN:

G. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER:: Mark BORER

DATE OF DECISION: April 6, 2016

DECISION: Appeal allowed

Canada

DECISION

[1] On consent, the appeal is allowed.

INTRODUCTION

[2] On August 14, 2015, the General Division dismissed the Appellant's appeal against the previous determination of the Commission.

[3] In due course, the Appellant filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] On March 3, 2016, a teleconference hearing was held. The Commission attended and made submissions, but the Appellant did not. As the Appellant had earlier spoken to Tribunal staff and expressed an awareness of the hearing date and time, I was satisfied that he was properly notified and proceeded in his absence.

THE LAW

[5] According to 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, 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.

ANALYSIS

[6] On the surface, this appeal concerns whether or not the Commission correctly calculated the Appellant's benefit rate. However, this case actually involves whether or not the conduct of the Commission during the appeal process conforms to the jurisprudence of the Federal Court of Appeal.

[7] The facts of this case are complex, but the material facts are not.

[8] The Appellant applied for benefits in four separate claims, which were accepted by the Commission. The Commission calculated an initial benefit rate for each claim, which the Appellant was unsatisfied with. At the time, the reconsideration process now mandated by the *Employment Insurance Act* did not exist, so the Appellant appealed directly to the board of referees (now the General Division).

[9] Prior to the board of referees hearing his case, the Appellant appealed an insurability ruling from the Canada Revenue Agency to the Minister of National Revenue (the MNR) which would be determinative of his claim. Because of this, his case was placed into abeyance until the ruling became available.

[10] Eventually, the MNR rendered a ruling favourable to the Appellant and the appeal was taken out of abeyance and assigned to a General Division member to be heard.

[11] At this point, things started to go wrong.

[12] The Commission, after declining to appeal the MNR decision, adjusted its previously determined benefit rates accordingly which resulted in the Appellant's overpayment being eliminated. It is not clear from the file when, if ever, the Appellant was informed of the Commission's new decision or its effect.

[13] On the Tribunal side, in due course a hearing was scheduled.

[14] At the hearing, the member reviewed the new improved benefit rate as revised by the Commission, and determined that as it reflected the MNR decision it was correct. On this basis, the member dismissed the Appellant's appeal.

[15] No doubt confused and annoyed by this dismissal, the Appellant appealed further. Once again, the Commission maintained in its written submissions that its calculations were based upon the MNR decision and therefore correct. The Commission also stated that "whether the SST-GD dismissed or allowed [the Appellant's] appeal is a moot point" and asked that I dismiss the Appellant's appeal.

[16] This raises two issues.

[17] First, I once again point out that neither I nor any member of the General Division has a free-standing ability to rule on issues as we see fit. Our powers derive solely from statute and are confined to ruling on the reconsideration decision or decisions (or, if made prior to April 1, 2013, the initial decision or decisions) of the Commission which are under appeal. In fact, the General Division is required by law to rule on each and every one of these decisions, and a failure to do so is a serious error of jurisdiction which the Appeal Division is obligated to intervene to correct.

[18] I therefore reject in the strongest of terms the assertion made by the Commission in their written submissions that this appeal is somehow "moot". Parliament, in setting out the powers of the Tribunal, has determined that the Tribunal should not concern itself with the effect of decisions, just with the decision itself. To be clear, we are required to rule on each and every decision put before us regardless of the practical effect of those rulings. It does not matter whether or not a Commission determination alters the eligibility of a claimant to benefits or increases or decreases the size of an overpayment. All that matters is whether or not the Commission decision under appeal was in compliance with the law and the jurisprudence.

[19] Second, although the Commission expressed some confusion as to why the Appellant was appealing the General Division decision, I am not in the least confused as to why this is so: it is because of the Commission's unfortunate decision to alter its initial determination about the benefit rate when the matter was already under appeal.

[20] This action, which is contrary to *Canada (Attorney General) v. Wakelin*, A-748-98, was all the more confusing to me since the Commission frequently (and correctly) cites

this decision to explain why they cannot alter a decision under appeal until the appeal has been resolved.

[21] The Court clearly stated in that decision that it was too late for the Commission to amend the decision under appeal once an appeal had been launched. After all, if a decision is amended mid-appeal it leads to confusion as to what is being appealed, exactly as has happened here.

[22] The Commission, in oral argument before me, readily admitted that this appeal was not moot and that they had erred in amending the benefit rate while it was under appeal. Although they supported their own amended decision as being correct on the merits, they conceded that the Appellant's appeal was actually of the initial pre-MNR ruling benefit rate and as such the Commission erred by acting contrary to *Wakelin*.

[23] The above inevitably leads to the conclusion that the General Division erred by not properly assessing its own jurisdiction and determining what decision was actually under appeal. I note that although this situation was caused by the Commission, it was the responsibility of the General Division member to be alert to issues such as this. By ruling on the Commission's amended decision, and not on the original decision, the member committed an error of jurisdiction which I am obligated to intervene to correct.

[24] As it would serve no purpose to return this matter to the General Division, I will give the decision the General Division member should have given.

[25] After reviewing the file and the detailed Commission calculations found in document GD4, I agree with the Commission that the amended benefit rate decisions were correct given the ruling of the MNR. The rate for the 2004, 2005 and 2006 claims should be $413.00, and the rate for the 2007 claim should be $423.00. The Commission has represented to me that this will eliminate the overpayment previously owed by the Appellant.

[26] The initial Commission determination is amended accordingly.

CONCLUSION

[27] For the above reasons and on consent, the appeal is allowed.

Mark Borer

Member, Appeal Division