



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *R. A. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 123

Tribunal File Number: GE-16-1030

BETWEEN:

R. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: July 13, 2016

DATE OF DECISION: September 30, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

R. A., the Appellant.

INTRODUCTION

[1] The Appellant made an initial claim for compassionate care benefits on January 5, 2016. The Canada Employment Insurance Commission (Commission) denied his claim on January 29, 2016. On February 8, 2016, the Commission received the Appellant's request for reconsideration of the decision. The Commission upheld its initial decision, and the Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on March 10, 2016.

[2] This appeal was heard by teleconference for the following reasons:

- (a) The information in the file, including the need for additional information.
- (b) This form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[3] The Tribunal must determine whether the Appellant is eligible for compassionate care benefits under section 23.1 of the *Employment Insurance Act* (Act).

THE LAW

[4] Compassionate care benefits are provided for in subsections 23.1(1) and (2) of the Act:

Definition

23.1 (1) In this section, "family member", in relation to an individual, means

- (a) a spouse or common-law partner of the individual;

(b) a child of the individual or a child of the individual's spouse or common-law partner;

(c) a parent of the individual or a spouse or common-law partner of the parent; and

(d) any other person who is a member of a class of persons prescribed for the purposes of this definition.

Compassionate care benefits

(2) Notwithstanding section 18, but subject to this section, benefits are payable to a major attachment claimant if a medical doctor has issued a certificate stating that

(a) a family member of the claimant has a serious medical condition with a significant risk of death within 26 weeks

(i) from the day the certificate is issued,

(ii) in the case of a claim that is made before the day the certificate is issued, from the day from which the medical doctor certifies the family member's medical condition, or

(iii) in the case of a claim that is regarded to have been made on an earlier day under subsection 10(4) or (5), from that earlier day; and

(b) the family member requires the care or support of one or more other family members.

Medical practitioner

(3) In the circumstances set out in the regulations, the certificate required under subsection (2) may be issued by a member of a prescribed class of medical practitioners.

Weeks for which benefits may be paid

(4) Subject to section 12, benefits under this section are payable for each week of unemployment in the period

(a) that begins with the first day of the week in which the following falls, namely,

(i) the day of issuance of the first certificate in respect of the family member that meets the requirements of subsection (2) and is filed with the Commission,

(ii) in the case of a claim that is made before the day the certificate is issued, the day from which the medical doctor certifies the family member's medical condition, or

(iii) in the case of a claim that is regarded to have been made on an earlier day under subsection 10(4) or (5), that earlier day; and

(b) that ends on the last day of the week in which any of the following occurs, namely,

- (i) all benefits payable under this section in respect of the family member are exhausted,
- (ii) the family member dies, or
- (ii) the period of 52 weeks following the first day of the week referred to in paragraph (a) ends.

[5] Subsection 50(8.1) of the Act provides that the Commission may require the claimant to provide it with an additional certificate issued by a medical doctor for the purpose of proving that the requirements of subsection 23.1(2) or 152.06(1) are met.

[6] Section 41.11 of the *Employment Insurance Regulations* (Regulations) defines family members for the purposes of compassionate care benefits:

(1) The following definitions apply in this section.

“ward” means a person for whom a guardian is appointed. (*pupille*)

“guardian” means a person having a legally recognized authority to act on behalf of a minor or disabled adult and includes a mandatary in case of incapacity, tutor and curator. (*tuteur*)

(2) The following classes of persons, in relation to an individual, are prescribed for the purposes of paragraph 23.1(1)(d) of the Act and paragraph (d) of the definition “family member” in subsection 152.01(1) of the Act:

(a) a child of the individual’s parent or a child of the spouse or common-law partner of the individual’s parent;

(b) a grandparent of the individual or of the individual’s spouse or common-law partner or the spouse or common-law partner of the individual’s grandparent;

(c) a grandchild of the individual or of the individual’s spouse or common-law partner or the spouse or common-law partner of the individual’s grandchild;

(d) the spouse or common-law partner of the individual’s child or of the child of the individual’s spouse or common-law partner;

(e) a parent, or the spouse or common-law partner of a parent, of the individual’s spouse or common-law partner; the spouse or common-law partner of a child of the individual’s parent or of a child of the spouse or common-law partner of the individual’s parent;

(f) the spouse or common-law partner of a child of the individual’s parent or of a child of the spouse or common-law partner of the individual’s parent;

- (g) a child of a parent of the individual's spouse or common-law partner or a child of the spouse or common-law partner of the parent of the individual's spouse or common-law partner;
- (h) an uncle or aunt of the individual or of the individual's spouse or common-law partner or the spouse or common-law partner of the individual's uncle or aunt;
- (i) a nephew or niece of the individual or of the individual's spouse or common-law partner or the spouse or common-law partner of the individual's nephew or niece;
- (j) a current or former foster parent of the individual or of the individual's spouse or common-law partner;
- (k) a current or former foster child of the individual or the spouse or common-law partner of that child;
- (l) a current or former ward of the individual or of the individual's spouse or common-law partner;
- (m) a current or former guardian of the individual or the spouse or common-law partner of that guardian;
- (n) in the case of an individual who has the serious medical condition, a person, whether or not related to the individual by blood, adoption, marriage or common-law partnership, whom the individual considers to be like a close relative; and
- (o) in the case of an individual who is the claimant, a person, whether or not related to the individual by blood, adoption, marriage or common-law partnership, who considers the individual to be like a close relative.

[7] Section 41.1 of the Regulations reads as follows:

A claimant is providing care or support to a family member when they:

- (a) directly provide or participate in providing care to the family member;
- (b) provide psychological or emotional support to the family member; or
- (c) arrange for the care of the family member by a third party care provider.

[8] Section 41.2 of the Regulations provides as follows:

For the purposes of subsections 23.1(3) and 152.06(2) of the Act, the medical certificate referred to in subsections 23.1(2) and 152.06(1) of the Act may be issued by the following persons:

(a) if the family member in need of care or support is in a geographic location in Canada where treatment by a medical doctor is not readily available, a medical practitioner designated by a medical doctor to provide treatment to the family member;

(b) if the family member in need of care or support is outside Canada, a medical doctor who is recognized by the appropriate governmental authority of the family member's country and has qualifications that are substantially similar to those of a medical doctor in Canada or, if the family member in need of care or support is in a geographic location outside Canada where treatment by a medical doctor is not readily available, a medical practitioner designated by a medical doctor to provide treatment to the family member.

EVIDENCE

[9] The Tribunal has reviewed all the documents in the appeal file. The following is a summary of the evidence that the Tribunal has found to be the most relevant to its decision.

[10] In his claim dated January 5, 2016, the Appellant applied for compassionate care benefits to care for his father for 13 weeks, starting on January 3, 2016.

[11] On January 8, 2016, the Appellant submitted the "Medical Certificate for Employment Insurance Compassionate Care Benefits" (INS5216B) forms to the Commission with all the necessary sections completed by Professor Djennaoui. The forms confirmed that Mr. A. had a serious medical condition and a significant risk of death within the next 26 weeks and that he required the care or support of one or more family members within those six months. However, the doctor did not answer the question in Part C of the form. On the same date, the Appellant also submitted the "Authorization to Release a Medical Certificate" (INS5216A) form to the Commission. It was noted that the Appellant also informed the Commission that he would be going to Algeria, where his father resided, the following week, and he left his contact information in Algeria.

[12] In a summary of a telephone conversation between the Commission and the Appellant's employer that took place on January 29, 2016, the Commission stated that the employer had confirmed that the Appellant had requested leave without pay, to which he was entitled, without mentioning compassionate care leave.

[13] In a letter dated January 29, 2016, the Commission informed the Appellant that he was not entitled to employment insurance compassionate care benefits starting on January 3, 2016

because the medical certificate he provided had not been completed by a medical doctor or other recognized medical professional as defined in the *Employment Insurance Regulations*.

[14] In a letter dated February 2, 2016, the Appellant explained the circumstances surrounding his claim and provided details on his father's medical condition. Among other things, he stated that his father had had surgery in Algeria on November 29, 2015 and that, to be by his side, he had taken all his available leave with his employer up to January 3, 2016, the date from which he was claiming employment insurance compassionate care benefits. The Appellant noted that he had been in Algeria from November 27, 2015 to mid-December and then starting on January 13, 2016.

[15] In a summary of a conversation between the Commission and the Appellant obtained on March 1, 2016, the Commission stated that it had informed the Appellant that form INS5216 had to be duly completed by a medical doctor and had to include the doctor's identification number. The Appellant apparently replied that medical doctors in Algeria did not have identification numbers but that he would be in Algeria from March 8 to 25, 2016 and he would submit another medical certificate when he returned. It was noted that the file would be reassessed with the new form the claimant was going to provide on his return.

[16] In a letter dated March 3, 2016, the Commission stated that it was upholding its decision that the Appellant was not entitled to compassionate care benefits because he had failed to submit a proper medical certificate.

[17] With his notice of appeal dated March 10, 2016, the Appellant submitted a "Medical Certificate for Employment Insurance Compassionate Care Benefits" (INS5216B) form dated November 16, 2016, with all the necessary sections completed by Professor Djennaoui. The form confirmed that Mr. A. had a serious medical condition and a significant risk of death within the next 26 weeks and that he required the care or support of one or more family members within those six months.

Appellant's testimony

[18] The Appellant stated that he had left for the first time to care for his father in Algeria on November 29, 2015. He stated that, at that time, he had informed his employer and taken all his

personal and sick leave up to January 3, 2016. In his opinion, he could have claimed employment insurance benefits starting in November, but he preferred to be honest and to take the leave he had available with his employer.

[19] Referring to Exhibits GD3-16 and GD2-19, the Appellant pointed out to the Tribunal that the first medical certificate he submitted, which was initially rejected by the Commission, was identical to the second one that was approved. He noted that the only difference was that the medical doctor's signature was at the bottom of the page on the first certificate, whereas he should have signed in the box above, and that he had initially not completed Part C.

[20] The Appellant confirmed that he had gone to be at his father's bedside in Algeria on January 13, 2016 and that he had returned on January 29, 2016, as indicated on the plane ticket in the file. He also confirmed that he had then been gone from March 9 to 25, 2016. The Appellant said that he coordinated his father's care with his brother, who lives in Europe, such that the tasks required to ensure that he had proper care were divided up.

[21] The Appellant had some questions for the Tribunal and wanted to know whether it is within the discretion of the Commission's officers to split benefits or whether this type of decision is based on a statutory provision stating that it is actually necessary to be at the person's bedside in order to receive benefits.

[22] The Appellant stated that he was in good faith and that he does not regret submitting all the information about his trips.

PARTIES' ARGUMENTS

[23] The Appellant argued that he is entitled to compassionate care benefits for the following reasons:

- (a) He provided a duly completed medical certificate shortly after he spoke to one of the Commission's officers, who explained to him the specific requirements for the certificate.
- (b) He submitted that it is unfair to have to choose between his father's health and the security of his children. He would have liked to stay at his father's bedside at all times,

but he could not afford to leave his children alone during that entire period. He said that he did not choose to make the trip four or five times but that it was in fact a necessity.

- (c) The Appellant argued that there should be no different in treatment based on the fact that his relative is in another country.
- (d) He should receive the benefits from January 3, 2016 for 13 weeks as claimed because he continued to have obligations during that time, even if he made a few return trips from Algeria to Quebec, and he had to coordinate all his father's care with his brother from a distance.

[24] The Respondent made the following points:

- (a) A new conclusion can be reached on the basis of new facts (the medical certificate signed by the medical doctor). The Commission therefore recommends granting two separate periods of compassionate care benefits, namely January 13 to 29, 2016 and March 8 to 25, 2016, since the Appellant provided a medical certificate signed by a medical doctor when he appealed to the Tribunal and those were the periods when he was out of the country in order to care for his sick father.
- (b) The claimant is not entitled to compassionate care benefits for the periods of January 3 to 12, 2016 and February 1 to March 7, 2016 and from March 28, 2016 on, since he was not with the sick person to care for him.

ANALYSIS

[25] According to section 23.1 of the Act, compassionate care benefits may not be paid to a claimant for more than 26 weeks to care for a family member who has a serious medical condition with a significant risk of death within six months. To receive benefits, a claimant must meet certain requirements, including providing a medical certificate clearly indicating the family member's risk of death within 26 weeks and stating that the member requires the care or support of one or more other family members.

[26] In this case, the Commission argued that the first medical certificate provided by the Appellant was not complete and signed by a recognized medical authority, which was why it

denied the Appellant's claim. During a subsequent trip to Algeria, the Appellant made sure with Dr. Djennaoui that the medical certificate was properly completed, this time with each section duly completed and the medical doctor's signature in the correct box. In light of this new evidence, the Commission now accepts that the medical certificate meets the requirements set out in the Act and recommends that compassionate care benefits be granted for the periods when the claimant was out of the country to care for his father, namely January 13 to 29, 2016 and March 8 to 25, 2016.

[27] The Tribunal agrees with the Commission and confirms that the certificate submitted by the Appellant meets the requirements of subsection 23.1(2) of the Act and section 41.2 of the Regulations. Since it was the Appellant's father who needed care, the Appellant also meets the requirements of subsection 41.11(2) of the Regulations. Accordingly, the Tribunal agrees with the Commission that the Appellant is eligible for compassionate care benefits.

[28] The only outstanding issue is therefore the period for which the Appellant should receive benefits. The Appellant claimed 13 weeks of benefits. However, the Commission argued that he should not receive the full 13 weeks claimed but only the weeks when he was in Algeria at his father's bedside. The Respondent seemed to be arguing that, to be eligible for compassionate care benefits, a claimant must be physically present at the bedside of the person in need of care. The Tribunal cannot agree with that conclusion. After the Respondent raised that argument, the Tribunal asked the following question: are claimants required to show that they were physically present with the person in need of care in order to be eligible for compassionate care benefits?

[29] The Tribunal notes that there is no case law dealing specifically with this question or this situation in which a person must care for a family member residing in another area or country. Based on an analysis of the Act's provisions, and specifically those dealing with the type of benefits in issue here, the Tribunal is relying on section 41.1 of the Regulations to answer the question. Under section 41.1 of the Regulations, a person is deemed to provide care to a family member when the person: (a) directly provides or participates in providing care to the family member; (b) provides psychological or emotional support to the family member; or (c) arranges for the care of the family member by a third party care provider.

[30] The Tribunal has difficulty understanding the Respondent's source for the restrictive requirement that a claimant must be at the bedside of the person in need of care. First of all, the Respondent cited no legislative provision to support physical presence as a requirement. For example, in the Tribunal's view, there is no indication of such a requirement in section 41.1, which defines who is deemed to provide care to a family member. The Respondent's argument therefore raises a question of interpretation.

[31] Regardless of whether it adopts a literal or a contextual interpretation in reading section 41.1, the Tribunal comes to the same conclusion, namely that the Act does not require the care provider to be physically present in order to qualify for benefits. According to literal interpretation principles, if there is no ambiguity in the Act, the words must be given their strict meaning (*R. v. Nabisi*, [1975] 2 S.C.R. 485). The definition of a care provider, as drafted by Parliament in section 41.1 of the Regulations, indicates that a person is deemed to provide care to a family member when the person directly provides or participates in providing care to the family member, provides psychological or emotional support to the family member and/or arranges for the care of the family member by a third party. In the Tribunal's opinion, neither in section 41.1 of the Regulations nor in any other legislative provision on this point has Parliament expressly indicated that the care provider must be physically present with the person in need of care. Since Parliament does not speak in vain, the Tribunal is of the view that it must confine itself to the wording of the Act and state what Parliament has said based solely on the existing wording. The Tribunal is therefore of the view that, if Parliament had wanted to limit access to compassionate care benefits to those who are physically with their family member, it would have specified this, which it did not.

[32] On the contrary, in defining who provides care, Parliament noted that a person can provide care by providing psychological or emotional support or by arranging for care by a third party. In the Tribunal's opinion, these two definitions of a care provider do not specifically require the claimant's physical presence. On the contrary, the Tribunal is of the view that a care provider may very well meet the definition in section 41.1 of the Regulations while being in a different place physically than the person receiving care. Indeed, the Tribunal is of the opinion that the definition includes a claimant who, for example, coordinates all the care to be provided to the family member or spends many hours on the telephone providing the family member with

psychological support, which is the Appellant's case. The Tribunal therefore finds that, as defined by section 41.1 of the Regulations, the claimant providing care does not have to meet the requirement of being physically with the family member. Other than section 41.1 of the Regulations, the Tribunal also finds that no provision of the Act supports the proposition that the number of weeks of compassionate care benefits must be limited to those during which the care provider is physically near the person in need of care.

[33] In the Tribunal's view, a systematic and logical (contextual) interpretation of the provisions of the compassionate care benefits scheme also leads to the conclusion that Parliament did not intend to limit access to the benefits to care providers who are physically with the family member in need of care. This method of interpretation looks for the overall consistency of the legislation (*R. v. Nabis*, [1975] 2 S.C.R. 485; *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27). It should therefore be asked what the standards surrounding the need for physical presence would be. At what distance from the family member and with what frequency would a claimant have to be physically present? The restriction suggested by the Respondent would raise many questions on which Parliament has chosen to remain silent. Trying to answer the questions would be a perilous exercise and would lead to absurd results that would very likely be contrary to the interests of justice. This case provides a clear example of this. The Appellant testified that, even though he came back to his home in Quebec twice, he was constantly involved in coordinating his father's care with his brother. In the Tribunal's view, this meets the definition in paragraph 41.1(c) of the Regulations. The Tribunal agrees with the Appellant that a claimant living in Abitibi who takes leave to care for a family member who lives in the Gaspé will not, on that account, be deprived of compassionate care benefits. Similarly, in the case of a claimant who lives two hours away from the family member in need of care, the Act does not require that the claimant go to the family member's home every day to physically take care of the family member. The Tribunal finds that, in the same way, the Appellant meets the definition of a care provider and therefore qualifies for the benefits, without any other restrictions. The Tribunal is also of the opinion that social legislation like the *Employment Insurance Act* ought to be interpreted in a broad and generous manner (*Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27) and that an overly restrictive interpretation would be inconsistent with the spirit of the legislation. The purpose of social legislation is to favour the beneficiaries of the legislation, not the reverse.

[34] In conclusion, the Tribunal accepts the Commission's recommendation in part. The Tribunal finds that the Appellant is eligible for compassionate care benefits under section 23.1 of the *Employment Insurance Act* (Act) for the entire 13 weeks claimed.

CONCLUSION

[35] The appeal is allowed.

Lucie Leduc
Member, General Division - Employment Insurance Section