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

Citation: *W. H. v. Canada Employment Insurance Commission,* 2016 SSTADEI 582

Tribunal File Number: AD-15-1031

BETWEEN:

W. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

DATE OF DECISION: December 21, 2016

Canada

DECISION

[1] On consent, the appeal is allowed.

INTRODUCTION

[2] Previously, 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] This appeal was decided on the record.

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 also 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. Based upon an insurability ruling from the Canada Revenue Agency, 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 also appealed the insurability ruling 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 General Division member, although she had received submissions from the Commission conceding the appeal, appears to have been under the impression that the Commission had already amended the benefit rate. Apparently for this reason, she dismissed the Appellant's appeal.

[13] This was not the case, and in fact if the Commission had done so it would have been contrary to *Canada (Attorney General) v. Wakelin*, A-748-98. In that decision, the Federal Court of Appeal clearly stated 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.

[14] Justifiably confused and annoyed by this dismissal, the Appellant appealed further to the Appeal Division.

[15] At the same time, the Commission was also confused as to why the General Division member had dismissed the Appellant's appeal. Correctly, they maintained their view that the benefit rate must be adjusted to take into account the MNR ruling.

[16] Unfortunately, the Commission then did exactly what *Wakelin* had stated should never be done and amended the initial decision while it was still under appeal (as admitted at AD2-1). It is also not clear from the file when, if ever, the Appellant was informed of the Commission's new decision or its effect.

[17] Realizing their error, the Commission now asks that I allow the appeal and give the decision that should have been given by the General Division.

[18] Given the above, I cannot but conclude that the General Division erred by not allowing the Appellant's appeal and adjusting the benefit rate to take into account the MNR ruling.

[19] As it would serve no purpose to return this matter to the General Division, I agree that I should resolve the matter.

[20] After reviewing the file and the detailed Commission calculations found in document GD4, I find that the amended benefit rate calculations submitted to the General Division by the Commission are 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.

[21] The initial Commission determination is amended accordingly.

[22] I note that the Commission submits that this will eliminate the overpayment previously owed by the Appellant.

CONCLUSION

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

Mark Borer

Member, Appeal Division