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

[TRANSLATION]

Citation: *D. B. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 160

Tribunal File Number: GE-16-1356

BETWEEN:

D. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Charline Bourque

HEARING DATE: November 4, 2016

DATE OF DECISION: December 30, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Mrs. D. B., the claimant, participated in the hearing in person at the X Service Canada Centre in X. She was accompanied by Counsel Jean-Guy Ouellet.

INTRODUCTION

[1] The Appellant filed a claim for Employment Insurance benefits effective June 17, 2012. On March 5, 2013, the Canada Employment Insurance Commission (Commission) informed the claimant that she was not entitled to regular Employment Insurance benefits beginning on January 6, 2013, because she had voluntarily left her job with Garda Gestion de Stationnements Inc. (Garda) on January 12, 2013, without just cause under the *Employment Insurance Act* (Act).

[2] On April 17, 2013, the Board of Referees unanimously allowed the claimant's appeal. On May 3, 2013, the Commission filed an application for leave to appeal and on August 5, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) granted leave to appeal. On March 30, 2016, the Tribunal's Appeal Division allowed the appeal and referred the matter back to the General Division for a *de novo* hearing.

[3] This appeal was heard in person for the following reasons:

a) the complexity of the issue(s)

b) the fact that credibility may be a determinative factor

c) the information in the file, including the need for additional information

d) the fact that the Appellant or other parties are represented

ISSUES

[4] The claimant is appealing the decision regarding a voluntary departure from her job pursuant to sections 29 and 30 of the Act.

EVIDENCE

[5] The evidence in the file is as follows:

a) A claim for Employment Insurance benefits filed on June 18, 2012 (AD2-5 to AD2-12).

b) A Record of Employment from Garda indicating a work period from July 13, 2012, to January 12, 2013—the Record of Employment was issued due to a voluntary departure (AD2-13).

c) A voluntary departure form submitted by the claimant on January 25, 2013—the claimant indicated that she left because of an abuse of power (AD2-14 to AD2-16).

d) On February 26, 2013, and on March 3, 2013, the claimant stated that she worked for Garda as a parking attendant at the X Casino. She was in outdoor parking lot P-12 with four other employees and they had a team leader on site who was also employed by Garda. The team leader had been removed and the Casino's parking lot supervisor—who was not employed by Garda—had taken the team leader's place and was deciding on parking procedures. He was referred to as the supervisor. He had been there for one to two weeks and had changed the procedures by putting in cones. This increased lineups for customers with vehicles. She did not agree with this new procedure and was so angry with these changes that she handed in her resignation that Saturday evening. She wrote a resignation letter that she gave to one of the team leaders indicating that she was resigning because of the new methods of operation. She confirmed that her job description, working conditions and hours had not changed. She had not been full-time since 2011 because there had been cuts. She confirmed that she did not wait for the employer's response before leaving and did not file a complaint through her union. The other employees were able to cope with the changes. She said she had wanted to leave for a while to work in another field. She took a paramedic course in 2011 to work

elsewhere, but she confirmed that she did not have alternate employment before resigning. She is under the MIRE program, to help her find a job. She admitted that she had resigned a bit quickly because she was angry. She said that the supervisor had told her she did not know how to work. She did not complain to the employer or the union about this. She said that it was her first day working under the new procedure and with the new supervisor. He told her to stand in one place, then changed his mind and told her to stand elsewhere. She was not going to let herself be talked to that way. She had worked for Garda for a long time—he did not even work for Garda, but for the Casino. She immediately complained to the Garda team leader on site and she was so angry that it was he who filled out the letter for her. She confirmed that she did not wait for the employer to respond to her complaint—she left right away. She admitted that she had made a mistake and that she should have waited and not left right away, but it was too late (AD2-18/19).

e) The employer confirmed that the claimant had not been happy with the new parking procedures. She had had a disagreement about them with the supervisor. She left the same day that she had complained about the new methods of operation, but she did not file a grievance (AD2-21).

f) A termination of employment document from Garda, indicating a voluntary departure. It is indicated that the reason for leaving is related to the new method of operation in P12 with the supervisor—it is a poor procedure because customers had to wait in line in the street at the entrance to P12 (AD2-26).

g) Letters of recommendation (AD2-36 to AD2-38).

h) A letter from Teamsters Quebec, local 1999, dated March 15, 2013, indicating that there had been a problem at Garda with the work of a parking attendant—[Translation] "The employer placed employees to supervise in a location where they were exposed to the wind, with no opportunity to warm up. Furthermore, we felt this location was very unsafe and that a serious accident could have occurred." The union concluded that the problem had been discussed with the employer and the situation had been quickly resolved (AD2-39).

i) An indictment dated May 15, 2012 (AD2-41).

j) The claimant's affidavit (RGD3-4 to RGD3-6).

k) The arbitration decision of September 30, 2016 (RGD3-8).

l) A medical certificate dated May 19, 2011, instructing the claimant to avoid working in an indoor garage due to fumes that induce coughing (former chemical pneumonitis caused by shotguard [*sic*] in a previous job) (RGD3-10).

m) A training acknowledgement (RGD4-1).

[6] The evidence submitted at the hearing through the Appellant's testimony revealed the following:

a) The claimant worked as an orderly for 23 years. She developed an illness following this work, and she could not be relocated to another position.

b) She indicated that she had completed the equivalent of grade 9, which she obtained while working in order to get a position in physiotherapy. She developed tennis elbow (epicondylitis). She went to work for a furniture company and developed a lung disease from the shotguard [*sic*] products used. Her lungs had second-degree burns. She was unable to continue working there. That is also why she is unable to work in an indoor garage at the Casino.

c) She also received retraining through the Movement for Integration and Retention in Employment (MIRE) program to assist her in her job search. She obtained a job with Garda.

d) As early as June 2011, instead of working 35 hours per week, she was working on-call due to cuts and renovations at the Casino. She worked in P12 parking lot, which was further away.

e) The Record of Employment shows variations in her hours. She works for minimum wage ($9.90 in 2012). She works approximately 25 hours per two weeks, as needed.

f) On January 12, 2013, she was working in the outdoor parking lot. Her supervisor was no longer a Garda team leader, but a traffic supervisor who worked directly for the Casino. The supervisor is a Casino employee who gives orders to Garda.

g) The supervisor decided that the method used for many years was no longer good. He decided to put cones in to prevent more than one car from entering at a time. He thought it was a good idea, but it did not work because cars could enter only one at a time rather than being able to park quickly.

h) That night, not only was there a new procedure, but the police were also turning away disabled customers and customers who had a card that normally allowed them to park indoors.

i) The claimant specified that she had discussed the situation with the supervisor. He had grabbed her by the arm and put her back in position to do her work. A customer who was angry about the wait almost ran into her. Furthermore, she was unable to do anything for the disabled customers. The supervisor did not want to do anything.

j) She had already been assaulted at the Casino in 2011, and she was afraid of being hit. She did not want to relive that situation. In 2011, she had told a customer that he was double-parked (in the exit lane). She had signaled to him to return to his lane. He became angry, grabbed her by the arm and shook her. She could not let him pass before the others. A complaint was filed. At the time of the proceedings, she did not feel she had the support of her employer. She was alone and afraid.

k) She spoke to the supervisor again, but he did not want to listen. She was scared. She quietly walked away. She was in a state of panic. She could not leave the disabled customers without assistance. Furthermore, the manner in which she approached her work was to take care of customers, whereas the supervisor did not want her to talk to disabled customers, even though they were unable to take the bus to go to the Casino. These customers were asking her questions, but she was unable to respond.

l) She was in tears and in a state of panic. She tried to discuss the situation with the Garda team leader. The employer gave her a letter of resignation to sign. It was the person

from Garda who had written the letter because she was unable to. She was afraid and was reliving the incident that she had previously experienced.

m) Since 2011, for her, Garda was gone from the Casino. When she saw the supervisor, for her, it was no longer Garda that was responsible, but rather the supervisor. He was a physically imposing individual. He asked the Appellant, who is small physically, to get in front of vehicles to stop them. Furthermore, she was afraid of reliving the incident that she had previously experienced.

n) She did not want to risk her life for the few hours that she was given at minimum wage. Furthermore, since 2011, she had been trying to return to her former job. She underwent training (PDEB) in order to return to her field. She dropped to part-time in June 2011, and started to look for work in residences. She succeeded in finding employment in a private residence, but the person died after a few weeks.

o) She also had letters of commendation for her customer service as a parking attendant. Those were her values and she could not help disabled customers. People were eager to go and play, so the priority was to get them to the Casino as quickly as possible. She is the only one who has letters of commendation for her customer service.

p) Garda has not replaced her since 2011 and she was unable to work in the indoor parking garage. She was able to work only at P12, which operated only on weekends.

Cited Case Law:

q) *Astronomo v. Canada (Attorney General)* FCA #A-141-97

r) CUB 34903A; CUB 35206; CUB 25209; CUB 39118; CUB 66996

s) *Montreuil v. Canada (Canada Employment and Immigration Commission)*, FCA #A-868-96

t) *Chaoui v. Canada (Attorney General)*, FCA #A-255-04

u) *D.L. v. Canada Employment Insurance Commission and Maitland Valley Marina Ltd.*, 2016 SSTADEI 180

v) *B.U. v. Canada Employment Insurance Commission*, 2016 SSTADEI 123

w) *Canada (Attorney General) v. Horslen*, FCA #A-517-94

PARTIES' ARGUMENTS

[7] The Appellant argued as follows:

a) The claimant submitted that several events had occurred: there was a change in working conditions (she went from full-time employment to on-call, as needed employment), the potentially dangerous nature of said employment given the customers' tension (she pressed assault charges), the lack of support from the employer institution (Casino), the distinct impression that the employer, subcontracted by the Casino, not wanting to offend the Casino, offered to write a resignation letter for an employee whose quality of work has been proven, and the third-party management of its employees (imposition of a Casino traffic supervisor in place of a Garcia [*sic*] attendant), the dangerous nature of the authoritarian and physical order given by said supervisor, without regard for Mrs. D. B.'s abilities, all on January 12.

b) The claimant also indicated that, since her working conditions had changed, she had started looking for alternate employment that corresponded to her qualifications. She was able to find a part-time job, but it did not last because the person she was caring for passed away. She tried to requalify for a public network to resume the duties she had previously held.

c) The claimant has limitations in terms of her inability to be employed as a security guard in the Casino's indoor parking garage, as well as her non-compliance with the Casino's rules on mobility-impaired individuals, which she felt contributed to the deterioration of her working conditions.

d) The Appeal Division member did not question the Board of Referee's' initial analysis, in which it had concluded that the claimant had just cause for leaving her job. Instead, the Appeal Division member returned the file because he had not concluded that leaving was the only reasonable alternative. The Board of Referees was not explicit enough about whether leaving was the only reasonable alternative (see paragraphs 29 and 34 from Mrs. Sheng).

e) At the time, leaving was the only reasonable alternative that the claimant could imagine possible.

f) The employer took corrective measures thereafter, but it recognized that at the time, the situation could have been dangerous for the claimant.

g) The Commission referred to *Astronomo* on the issue of the only reasonable alternative. The decision refers to paragraphs (*d*), (*e*), (*g*) and (*i*) of section 17 of the Act (1993), which refers to the grounds of justification for the only reasonable alternative. In the claimant's case, it is clear that she was in a dangerous situation. Furthermore, there was a change to her duties because she was no longer able to help individuals with disabilities. There were also changes to her pay, given that she went from full-time employment to part-time, on-call employment. Considering these three factors, her leaving was the only reasonable alternative.

h) Furthermore, as in the decision in *White*, the Court said the problem must be resolved or alternative employment must be found, which is what the claimant did. She found another job in her field. This job was short-lived, but the claimant had looked for a job and had found one.

i) In *Montreuil*, where the union negotiated a 25% decrease in salary, the claimant was justified in leaving the job due to the decrease in salary.

j) In *Chaoui*, paragraph 7 indicates that the burden is not to find a job, but to look for one.

k) In *D.L. v. Canada Employment Insurance Commission* 2016 SSTADEI 180, paragraph 13, Mr. Borer indicates that it is not a matter of remaining in a job until a new one is

found, because that would render meaningless the reasonable alternative of staying until a new job is found. This differs from the decision in *Hernandez* (CUB 66996), where there is a potential risk of developing lung disease. In this case, the risk is not potential, but immediate. It is an immediate and intolerable situation, coloured by a difficult situation that the claimant had previously experienced. Paragraph 14, where Mr. Borer asks questions. In the claimant's case, the union confirmed the danger. Furthermore, there was no alternative solution; they asked her to give her resignation. At that point, the situation was so unbearable that the claimant was justified in leaving.

l) In *B.U. v. Canada Employment Insurance Commission*, 2016 SSTADEI 123, paragraph 7, where it is a matter of safety deficiencies. The claimant discussed the situation with the supervisor, then with her team leader at Garda, and they asked her to resign. There is corroboration that the union confirmed that corrective action had been taken regarding the situation in question.

m) As for the decrease in hours, the *Horslen* decision, the Record of Employment shows the same situation where, not only were the hours reduced, but also they were no longer guaranteed.

n) For the purpose of the definition of suitable employment, in section 9.002 of the *Employment Insurance Regulations* (Regulations), the claimant's health status and physical capabilities, but also paragraph (*c*), where it states that the work is not contrary to the claimant's personal beliefs. CUB 39118, where a person leaves their job because the new buyer is a religious group and they find that this is contrary to their personal beliefs.

[8] The Respondent made the following submissions:

a) In the case of a voluntary departure, the following legal test is applied: having regard to all the circumstances, did the claimant have any other reasonable alternative to leaving their job?

b) In this case, the Commission could conclude only that the claimant had failed to prove beyond a reasonable doubt that her voluntary departure on January 12, 2013, was the only reasonable alternative.

c) To support this conclusion, to the effect that the claimant had not tried to find a reasonable alternative, the Commission relied on the claimant's explanations.

d) These explanations are clear and unequivocal; the claimant stated:

- Nothing had changed in her job, except a procedure, and she seemed to be the only one who did not accept this procedure, because she noted that the other employees were coping with the changes (Exhibit 5-1).

- She admitted she had made a mistake in leaving her job impulsively, without waiting to find out the result of her complaint with the team leader (Exhibit 5-2).

- She was unionized, but she did not file a complaint through her union (Exhibit 5-1).

- She had no other job before she left (Exhibit 5-1).

e) With respect to the above-mentioned points, the Commission maintains the imposed exclusion, because it complies with the existing regulations under section 30 of the Act.

Relevant Case Law:

f) Concerning just cause for voluntary leaving, the Commission based its decision on the Federal Court of Appeal decision in *Rena Astronomo* (A-141-97). This decision confirms the principle, established in *Tanguay* (A-1458-84), that a claimant who leaves their job must show they had no alternative to leaving.

g) The Commission also based its decision on CUB 75833, which relates to the present case because it consists of a voluntary departure where the claimant invoked a change in duties. That case relates well to this one, because it is also about changes but, this time, to a procedure. The decision rendered in the above-mentioned case was in the Commission's favour.

h) In support of its decision, the Commission also cited CUB 61667, which is a case containing similar elements to the present case. In fact, in CUB 61667, the claimant left his job in the heat of the moment, in frustration, and without looking for a reasonable alternative. The following excerpts support this decision:

> [Translation]
>
> However, he stated that he did think he would leave his job. The Board found that, based on the evidence, the claimant decided to leave his job in the heat of the moment, out of pure frustration and without careful consideration. He did not take into consideration the options available to him. Nor did he take reasonable measures to resolve the unsatisfactory working conditions, and he failed to look for another job.
>
> Another solution, even at a late state, would have been for the claimant to explain to Mr. Tallas the reasons why he left on May 17, 2002, in the hope that he would take measures to correct the situation with the foreman. […]

ANALYSIS

The relevant legislative provisions are reproduced in an appendix to this decision.

[9] Subsection 30(1) of the Act provides that a claimant is disqualified from receiving any benefits if they lost any employment because of their misconduct or if they voluntarily left any employment without just cause.

[10] In *White*, the Court established that the onus is on the Commission to prove that the claimant left voluntarily. The claimant must then demonstrate, on a balance of probabilities, that they had no reasonable alternative to leaving (*Canada (Attorney General) v. White*, 2011 FCA 190).

[11] The claimant indicated that she left her job because it was the only reasonable alternative. She claimed that she had found herself in a situation that was dangerous to her safety, and that there had been a change in her duties because she could no longer help disabled individuals, which was contrary to her beliefs. Furthermore, there had been a significant change to her pay given that she went from full-time employment to part-time, on-call employment.

[12] For its part, the Commission argued that the claimant had failed to show beyond a reasonable doubt that voluntarily leaving her job on January 12, 2013, was the only reasonable alternative. The Commission referred to the claimant's statements:

- Nothing had changed in her job, except a procedure, and she seemed to be the only one who did not accept this procedure, because she noted that the other employees were coping with the changes (Exhibit 5-1).

- She admitted she had made a mistake in leaving her job impulsively, without waiting to find out the result of her complaint with the team leader (Exhibit 5-2).

- She was unionized, but she did not file a complaint through her union (Exhibit 5-1).

- She had no other job before she left (Exhibit 5-1).

[13] Relying on the parties' evidence and submissions, the Tribunal is satisfied that there was a voluntary departure. The question the Tribunal must therefore address in the present case is whether this voluntary departure was the only reasonable alternative.

[14] Paragraph 29(*c*) of the Act indicates that a claimant has just cause for voluntarily leaving an employment or taking leave from an employment if they had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following;

(iv) working conditions that constitute a danger to health or safety;

(vii) significant modification of terms and conditions respecting wages or salary;

(ix) significant changes in work duties;

[15] The claimant argued that she had just cause for leaving her job due to the above-mentioned circumstances.

[16] The claimant explained that, on January 12, 2013, the Casino traffic supervisor had decided to modify the operation of the parking garage where she was working. She notes that the situation was difficult and that this new method of operating did not work. The claimant

tried to talk to the traffic supervisor, but he told her to stay in one place and stop vehicles. The claimant said that a vehicle had nearly hit her—the driver had been angry.

[17] The claimant explained that she was afraid of reliving the events she had experienced in 2011, when she had been grabbed by the arm and shaken by an angry customer. She feared for her safety. She then tried to explain the situation to her team leader with Garda, but she offered to write her letter of resignation.

[18] The employer confirmed that the claimant was not happy with the new parking procedures and that she had left the same day as her complaint about these new procedures (AD2-21).

[19] The Tribunal finds that the union had indicated in a letter dated March 15, 2013, that [translation] "Garda had had a problem with the parking lot attendant's work" and that the location "was not safe, and there could have been a serious accident" (AD2-39).

[20] The Tribunal also considers the incident that the claimant had experienced in March 2011. This event is described in Garda's accident report (AD2-40). The claimant explained that she had gone to Court alone and that she did not feel supported by her employer following the incident.

[21] The Tribunal finds that, considering the history of events experienced by the claimant in 2011, she could sense her safety being endangered during the incident in January 2013 because of the similarities between the two situations. The claimant was very emotional when she had to talk about the incident in front of the Tribunal, and the Tribunal understood that she had been greatly affected by it.

[22] The Tribunal also finds that the claimant did not leave immediately. Even if she had left her job the same day as the change in procedures, she tried to discuss the situation with the Casino's parking lot attendant, then with her team leader at Garda.

[23] The Tribunal considers that the Commission mentioned the fact that the claimant had acted in the heat of the moment, and it referred to CUB 75833. The Tribunal is of the opinion that, even if the claimant may have subsequently regretted her action, the fact remains that at

the time of the incident, she feared for her life and was reliving the incident from 2011. She could not see at that moment how the employer could help her when she had approached two persons in authority about the situation and was offered a resignation letter.

[24] Finally, the Tribunal also finds that there was a potentially dangerous situation when the claimant was working as a parking lot attendant. Given the particular circumstances experienced by the claimant, the Tribunal finds that, on a balance of probabilities, her voluntary departure was the only reasonable alternative because her working conditions posed a threat to her safety—even if the situation had been resolved at one time or another by the employer.

[25] The Tribunal finds that it is not necessary for the claimant to justify a voluntary departure on several grounds, while other grounds to justify the voluntary departure were raised by the claimant. Thus, relying on the evidence and submissions made by the parties, and given all the circumstances, the Tribunal finds that, on a balance of probabilities, the claimant had just cause for leaving her job because under subparagraph 29(*c*)(iv) of the Act, leaving was the only reasonable alternative.

CONCLUSION

[26] The appeal is allowed.

Charline Bourque
Member, General Division – Employment Insurance Section

ANNEX

THE LAW

Employment Insurance Act

29 For the purposes of sections 30 to 33,

(a) *employment* refers to any employment of the claimant within their qualifying period or their benefit period;

(b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;

(b.1) voluntarily leaving an employment includes

> **(i)** the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,
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> **(ii)** the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and
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> **(iii)** the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

> **(i)** sexual or other harassment,
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> **(ii)** obligation to accompany a spouse, common-law partner or dependent child to another residence,
>
> **(iii)** discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,
>
> **(iv)** working conditions that constitute a danger to health or safety,
>
> **(v)** obligation to care for a child or a member of the immediate family,
>
> **(vi)** reasonable assurance of another employment in the immediate future,
>
> **(vii)** significant modification of terms and conditions respecting wages or salary,
>
> **(viii)** excessive overtime work or refusal to pay for overtime work,
>
> **(ix)** significant changes in work duties,

(x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,

(xi) practices of an employer that are contrary to law,

(xii) discrimination with regard to employment because of membership in an association, organization or union of workers,

(xiii) undue pressure by an employer on the claimant to leave their employment, and

(xiv) any other reasonable circumstances that are prescribed.

30 (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

Length of disqualification

(2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

(4) Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

(5) If a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

(a) hours of insurable employment from that or any other employment before the employment was lost or left; and

(b) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

(6) No hours of insurable employment in any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.

(7) For greater certainty, but subject to paragraph (1)(*a*), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.