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

[TRANSLATION]

Citation: *M. L. v. Canada Employment Insurance Commission*, 2017 SSTADEI 237

Tribunal File Number: AD-16-1291

BETWEEN:

M. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: June 6, 2017

DATE OF DECISION: June 16, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On October 14, 2016, the General Division found that the disentitlement imposed on the Appellant for failing to provide medical evidence pursuant to subsection 40(1) of the *Employment Insurance Regulations* (Regulations) was founded.

[3] On November 16, 2016, the Appellant filed an application for leave to appeal with the Appeal Division after being notified of the General Division's decision on October 21, 2016. Leave to appeal was granted on December 20, 2016.

ISSUE

[4] The Tribunal must decide whether the General Division erred when it found that a disentitlement imposed on the Appellant for failing to provide medical evidence pursuant to subsection 40(1) of the Regulations was founded.

SUBMISSIONS

[5] The Appellant submits the following reasons in support of his appeal:

- After exhausting all the sick days he had accumulated with his employer, the employer had no other work for him. The employer therefore provided the Appellant with the Record of Employment necessary to make a claim for Employment Insurance sickness benefits.

- During the processing of his application, the Respondent notified the Appellant that he would have to provide a medical certificate upon request. The Appellant notes that the Respondent never made such a request.

- Based on the medical certificates, the Appellant should not work the evening shift for various reasons. Yet, the employer is unable to accommodate him, because no daytime work is available.

- After exhausting his sickness benefits (15 weeks), the Appellant filed for regular benefits. This application was refused on the pretext that he was not available for work, which is a requirement.

- On the one hand, he claims that the Respondent does not consider him to be sick. On the other, he submits that the Respondent is refusing his claim for regular benefits, which is contradictory.

[6] The Respondent submits the following arguments against the appeal:

- In order for a person to prove that they are unable to work due to illness, injury or quarantine, they must obtain, at their own expense, a medical certificate attesting to the incapacity, the date of onset and the probable duration of the illness, and it must be signed by a doctor or any other health care professional.

- After reviewing all the evidence, the Respondent found that the Appellant had not provided a medical certificate demonstrating that he was totally disabled from working—only that he had limitations that prevented him from working after 3:00 pm.

- The Appeal Division does not have the authority to retry a case or to substitute its discretionary power for that of the General Division. The Appeal Division's powers are limited under subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

THE LAW

[7] According to subsection 58(1) of the DESD Act, 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.

STANDARDS OF REVIEW

[8] The Appellant did not make any submissions regarding the applicable standard of review.

[9] The Respondent maintains that the Appeal Division does not have to defer to the General Division's conclusions regarding questions of law, regardless of whether the error appears on the face of the record. However, for questions of mixed fact and law, the General Division must show deference to the General Division. It can only intervene if 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—*Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[10] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (Attorney General) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that "[w]hen it acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court."

[11] The Federal Court of Appeal further indicated that:

> Not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards", for the Federal Court and the Federal Court of Appeal.

[12] The Federal Court of Appeal concludes by emphasizing that "[w]here it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act."

[13] The mandate of the Tribunal's Appeal Division as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[14] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

ANALYSIS

[15] As outlined in the General Division decision, the Appellant's medical certificate indicates that he cannot work during the second half of the day, or after 3:00 pm. However, he can work during the first half of the day.

[16] The Appellant does not dispute the fact that he was available for work during the first half of the day. He faults the Respondent mainly for delaying in asking him for his medical certificate. He insists that the Respondent had advised him to keep his medical certificate on hand to provide on request. He even had it with him when he visited the Respondent's service centre.

[17] The Tribunal has no choice but to conclude that the medical certificate that the Appellant filed does not certify that his illness or injury rendered him incapable of performing the duties of another suitable employment, in accordance with subsection 40(4) of the Regulations.

[18] Therefore, the Appellant failed to provide medical evidence under subsection 40(1) of the Regulations, which makes him ineligible for sickness benefits.

[19] As the Tribunal noted during the hearing, it would have been more appropriate for the Appellant to appeal the Respondent's decision on the refusal of his claim for regular benefits.

[20] Despite the Tribunal's sympathy for the Appellant, the appeal must be dismissed.

CONCLUSION

[21] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division