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

Citation: *I. I. v Canada Employment Insurance Commission*, 2019 SST 15

Tribunal File Number: AD-18-461

BETWEEN:

I. I.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: January 10, 2019

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] At its root, this case is about whether the Appellant, I. I. (Claimant), a driver, should have been entitled to convert his claim from Employment Insurance sickness to regular benefits after November 30, 2015. The Claimant argues that his family physician stated that he was able to work as of November 30, 2015, and a neurologist medically cleared him for driving after November 30, 2015. The General Division rejected the Claimant's assertions that he had been able to work after November 30, 2015, because his family physician had initially stated that the Claimant would be unable to work from July 31, 2015, to February 11, 2016.

[3] The Claimant is appealing the General Division's decision, on the ground that the General Division based its decision on an erroneous finding of fact without regard for his medical circumstances or a neurologist's opinion. He claims, among other things, that his medical issues affected his ability to communicate with the Commission and with his physician, and that the General Division should have recognized this. I must decide whether the General Division based its decision on an erroneous finding of fact that it made without regard for the medical evidence.

[4] I am dismissing the appeal because, although I found that the General Division failed to address one of the medical records, overall the evidence was insufficient to establish that the Claimant was available for work after November 30, 2015.

ISSUES

[5] There are two issues before me:

1. Did the General Division base its decision on erroneous findings of fact without regard for the fact that the Claimant's medical issues affected his ability to communicate with the Commission and his physician?

2. Did the General Division base its decision on erroneous findings of fact without regard for a neurologist's opinion?

ANALYSIS

[6] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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.

Issue 1: Did the General Division base its decision on erroneous findings of fact without regard for the fact that the Claimant's medical issues affected his ability to communicate with the Commission and his physician?

[7] The Claimant argues that the General Division erred under section 58(1)(c) of the DESDA because it failed to consider evidence regarding his medical circumstances. He contends that his medical issues caused confusion and impaired his ability to make decisions and to communicate effectively. As a result, a Service Canada agent misunderstood him and directed him to "identif[y] sickness in his reports"[1] although, at the same time, the agent assured him that this would not affect his claim for regular benefits. The Claimant stresses that he intended to always seek regular benefits, but his medical condition made him unable to clarify with the agent that, despite driving restrictions, he was still able to work and was "still very actively looking for some sort of employment."[2]

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[1] Claimant's revised letter dated August 14, 2018, at AD1A-4.
[2] *Ibid*. at AD1A-3.

[8] The Claimant asserts that his medical issues also led to miscommunication with his family physician and, as a result, his physician provided a medical note that addressed his ability to work at his usual occupation, rather than his ability to work at any occupation. The Claimant argues that the General Division should have considered his medical state.

[9] The General Division relied on the evidence and the arguments before it. The Claimant argued that his medical state was such that he could not effectively communicate with his family physician or with Service Canada. However, there was no supporting documentary evidence before the General Division that the Claimant's mental condition was such that he could not effectively communicate with the Commission or his own physician. There were medical records that confirmed the Claimant's alcohol withdrawal seizures, but they did not detail other alcohol-related symptoms. The medical records before the General Division did not document the Claimant's confusion or show that he was unable to make decisions for himself, unable to communicate with others, or somehow incapable of acting for himself. The General Division did not fail to consider this evidence because it did not have this evidence before it. In short, I find that the General Division did not base its decision on an erroneous finding of fact that it made without regard for the Claimant's medical state.

[10] Nevertheless, the General Division considered the Claimant's arguments that he had never intended to convert his claim to sickness benefits, that he had been looking for work throughout the period in question, and that his physician's notes failed to mention that he could work, albeit with some restrictions. However, the General Division dismissed these arguments because it found them inconsistent with the early evidence. It was open to make this conclusion, based on the evidence before it.

Issue 2: Did the General Division base its decision on erroneous findings of fact without regard for a neurologist's opinion?

[11] The Claimant argues that, although his family physician prepared a medical note in February 2016 declaring him unable to drive because of seizures, in November 2015, a neurologist had already declared him fit to drive, so he was in fact able to return to work by November 30, 2015. The Claimant argues that the General Division should have considered the neurologist's opinion regarding his fitness to drive because it would have helped to establish that

he was available for work. Indeed, the Claimant made this argument in the proceedings before the General Division.[3]

[12] The Claimant submits that if the General Division had considered the neurologist's report, it would have determined that he was able to work by November 30, 2015, and it would have decided that, as a result, he would have been entitled to convert his claim to regular benefits from that date.

[13] The General Division did not refer to or examine the neurologist's report. Instead, the General Division considered the family physician's brief medical notes. The family physician had prepared notes on November 27, 2015 (amended on February 3, 2016); April 18, 2016; and November 14, 2017:

- The November 2015 note[4] simply stated that the Claimant was unable to work for an indefinite time from July 31, 2015, onwards;
- The amended note dated February 3, 2016,[5] stated that the Claimant had been unable to work for an indefinite period since July 31, 2015. He had been unable to work "due to having no licence to drive secondary to a seizure;"
- The April 2016 note[6] indicated that the Claimant was unable to work from July 31, 2015, to February 11, 2016, and that he was able to return to work on February 11, 2016; and
- The November 2017 note[7] clarified that the Claimant was able to return to work as of November 30, 2015, though the physician did not explain how he came to this opinion.

[3] At approximately 2:28 of the audio recording of General Division hearing.
[4] Medical note dated November 27, 2015, at GD3-15.
[5] Medical note dated November 27, 2015, and amended on February 3, 2016, at GD3-19.
[6] Medical note dated April 18, 2016, at GD3-27.
[7] Medical note dated November 14, 2017, at GD7-11.

[14] The General Division assigned little weight to the November 2017 opinion because the physician failed to explain why he had changed his mind that the Claimant was able to return to work as of November 30, 2015. There was nothing to support the physician's new opinion.

[15] The neurologist's report could have been material, i.e. important, towards supporting the family physician's November 2017 note. Not only was it one of the few records prepared around November 2015, but it addressed, in part, the Claimant's functionality. The General Division therefore should have considered the neurologist's report. I find that in failing to do so, the General Division erred under section 58(1)(c) of the DESDA by basing its decision on an erroneous finding of fact that it made without regard for the material before it.

DISPOSITION

[16] Under section 59(1) of the DESDA, the Appeal Division may dismiss the appeal; give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate; or confirm, rescind, or vary the decision of the General Division in whole or in part.

[17] In his appeal to the General Division, the Claimant argued that the neurologist's medical examination report, when read with all of the other medical evidence, established that he was able to return to the workforce on November 30, 2015.[8] In the report, the neurologist recommended a class 5 driver's licence.[9] The medical examination report was the only medical record that was prepared on November 30, 2015. The neurologist otherwise did not address the issue of the Claimant's capacity for work.

[18] The Commission argues that the neurologist's examination report is immaterial because it does not establish that the Claimant was capable of returning to work by November 30, 2015. The Commission argues that, at most, the neurologist's report addresses the Claimant's fitness to drive a motor vehicle. The Commission submits that the General Division did not have to refer to

[8] Claimant's letter dated November 15, 2017, at GD7-3.
[9] Neurologist's medical examination report, November 30, 2015, GD7-7 to GD7-8.

or consider the neurologist's report because it would not have changed the outcome of the proceedings, whether on its own or in concert with the other medical opinions.

[19] The February 2016 note is the only medical opinion that explains why the Claimant had been unable to work. The family physician explained that it was because the Claimant did not have a licence to drive after he had had a seizure.

[20] The medical evidence shows that the Claimant had a history of alcohol withdrawal seizures. By November 30, 2015, the Claimant's neurologist recommended a class 5 driver's licence without any driving restrictions. If driving had been the only barrier to a return to work, then arguably the Claimant could have been available to work by then, subject, of course, to reinstatement of his driver's licence.

[21] Although the Claimant might have been able to resume driving, there may have been other medical issues—including the neurological confusion, delirium, mental clarity, and extreme emotional anxieties that he referred to in his notice of appeal[10]—that could have impacted his capacity for work and affected his ability to resume working after November 2015. In other words, the medical evidence before the General Division simply was insufficient to establish that the Claimant was capable of and available to work as of November 30, 2015, until February 2016.

[22] The Claimant states that his seizures were the only barrier to driving and to a return to work. I might have been prepared to accept this argument, given the medical evidence that was before the General Division. Even so, the Claimant states that he was restricted from driving for six months, starting from August 17, 2015. I note that there is some conflicting evidence on this point. The Claimant testified before the General Division that he was restricted from driving until approximately mid-January 2016.[11] Either way, although the neurologist may have recommended that he was able to drive by November 30, 2015, he was still legally restricted from driving up to either mid-January 2016 or February 2016 and, on this basis, was therefore unavailable for work. He acknowledges that he relied on being able to drive for work.

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[10] Request for leave to appeal / Notice of Appeal, at AD1.
[11] At approximately 40:52 of the audio recording of the General Division hearing, the Claimant testified that he was unable to drive until approximately mid-January 2016.

[23] The General Division should have addressed the neurologist's report, but I do not see this error as being fatal to its decision, given the evidence before it. The neurologist's report showed that, from a neurological and medical perspective, the Claimant was fit to drive, but the report did not address the issue of whether the Claimant was now authorized to resume driving, nor did it address whether there were other issues that could have affected the Claimant's capacity to work. Above all, even if the Claimant was available for work, there was little, if any, evidence of his efforts to find work.

CONCLUSION

[24] For the reasons that I have set out above, the appeal is dismissed.

Janet Lew
Member, Appeal Division

HEARD ON:	December 6, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	I. I,, Appellant Carol Robillard, Representative for the Respondent