



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. A. v Canada Employment Insurance Commission*, 2019 SST 1224

Tribunal File Number: GE-19-745

BETWEEN:

J. A.

Appellant/Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Catherine Shaw

HEARD ON: February 28, 2019

DATE OF DECISION: March 1, 2019

DECISION

[1] The appeal is allowed. The Claimant has proven he was capable of and available for work and was making reasonable and customary efforts to find suitable employment from September 10, 2018 to December 28, 2018. Therefore, he is not disentitled from receiving benefits under sections 18(1)(a) and 50(8) of the *Employment Insurance Act* (Act) during this period.

OVERVIEW

[2] The Claimant left his employment due to a health condition and made an initial claim for employment insurance sickness benefits. He made a claim for regular benefits in September 2018, after his doctor cleared him to return to work with medical restrictions. The Canada Employment Insurance Commission (Commission) contacted the Claimant and his daughter advised that he was having surgery in the following year, after which he may be able to return to his former employment. The Commission suggested the Claimant look into other forms of social assistance, as he was not able to return to work without medical restrictions until the next year. The Claimant accepted the advice, but after looking into social assistance, decided to continue with his employment insurance claim. The Commission issued a decision letter stating that, due to the Claimant's medical restrictions, he had failed to prove his availability for work.

[3] The Claimant requested a reconsideration of this decision because he had been seeking work within his physical limitations. The Commission advised him to be evaluated by an employment counselor to verify if he was capable of working any jobs. The Claimant did so and the Commission modified its decision to state the Claimant had failed to prove his availability for several months, but was considered available from when he consulted an employment counselor. The Claimant appeals this decision to the Social Security Tribunal (Tribunal).

ISSUES

[4] Has the Claimant proven he was capable of and available for work from September 10, 2018 to December 28, 2018?

[5] Was the Claimant making reasonable and customary efforts to find suitable employment from September 10, 2018 to December 28, 2018?

ANALYSIS

[6] To be entitled to receive regular employment insurance benefits, claimants have to prove that, for each working day, they are capable of and available for work and unable to obtain suitable employment.¹ They may also be required to show they made reasonable and customary efforts to find suitable employment.²

[7] Claimants have the burden of demonstrating that they meet the requirements for receiving employment insurance benefits and that no circumstances exist that will disentitle or disqualify them from receiving benefits, including the availability requirements provided for in the *Act*.³

Has the Claimant proven he was capable of and available for work from September 10, 2018 to December 28, 2018?

[8] The Claimant can establish his availability by proving his desire to return to the labour market as soon as a suitable job is offered through demonstrating efforts to find a suitable job and without setting personal conditions that might limit his chances of returning to the labour market.⁴

[9] In order to assess the Claimant's availability, I first turn to the question of what is considered suitable employment for him. To determine what constitutes suitable employment for the Claimant, I must consider whether his health and physical capabilities allow him to commute to the place of work and to perform the work.⁵

[10] The Claimant states that he has a health condition which restricts him from standing for long periods of time. In support of his statement, he provided two doctor's notes dated September 12, 2018 and November 21, 2018. These notes state that the Claimant can only work in a seated position, that he cannot work in a standing position, and that he can lift ten pounds.

¹ Employment Insurance Act, paragraph 18(1)(a).

² Employment Insurance Act, subsection 50(8).

³ *Canada (Attorney General) v. Picard*, 2014 FCA 46; *Canada (Attorney General) v. Peterson*, A-370-95.

⁴ *Faucher v. Canada Employment and Immigration Commission*, A-56-96.

⁵ The full criteria to be considered when determining whether an employment is suitable are listed in the Employment Insurance Regulations, paragraph 9.002(1)(a).

[11] At the hearing, the Claimant's daughter acted as the Claimant's representative and gave testimony as a witness. She stated that her father's former employment involved standing all day and he was unable to continue in that position due to his health condition. She testified that her father is able to stand for short periods of time, for example 30 minutes to one hour, and is capable of walking and driving as part of his normal activities.

[12] Based on the Claimant's submissions and his witness's testimony, I find suitable employment for the Claimant is any employment that can be performed in a seated position, that may require only short periods of standing, and does not require heavy lifting.

[13] The Claimant made a claim for regular employment insurance benefits on September 12, 2018. He provided a medical note to the Commission which stated that he could only work in a seated position. The Commission provided notes of a conversation with the Claimant's daughter on October 23, 2018, who spoke to the Commission on the Claimant's behalf, as he has limited language skills in English and French. The notes state the Claimant's daughter told the Commission the Claimant was scheduled to receive surgery in the following year, after which time he wants to return to his former employment. She then told the Commission that they preferred for the Claimant to apply for social assistance, rather than look for employment on a full-time basis.

[14] At the hearing, the Claimant's daughter stated the Commission's notes misrepresented this conversation. She stated the Commission asked whether the Claimant would prefer to apply for social assistance, rather than trying to find a job within his medical restrictions, as his job opportunities would be quite limited. The Claimant's daughter agreed to explore this option, as the Commission had advised her that social assistance payments could be made retroactively and they would receive payment for a longer period of time. The Claimant's daughter stated she inquired about the Claimant's social assistance the next day and discovered that the Claimant could not receive retroactive payments. She then advised the Commission that the Claimant would not be pursuing social assistance and wanted to continue with his employment insurance claim. She stated the Commission informed her that the request would be processed and she could call back in a week for the results. She stated she called back in a week and was advised to call again in another week. She called again on November 14, 2018, and was told she would

need to request a reconsideration of the Commission's decision to have the Claimant's claim for benefits reactivated.

[15] I prefer to rely on the Claimant's daughter's explanation of the conversation with the Commission on October 23, 2018, rather than the Commission's brief notes. The Claimant's daughter provided open and credible testimony regarding the details of the conversation and was able to answer my questions directly in a straightforward manner. Her testimony is further supported by the timeline of the Commission's subsequent notes in the Claimant's record. The Commission notes the Claimant's daughter called on October 29, 2018, to advise that the Claimant would not be pursuing social assistance, and wanted to continue his employment insurance claim. Her next two telephone calls are recorded as occurring on November 7, 2018 and November 14, 2018. In the latter call, it notes she was informed of the Commission's decision.

[16] The Claimant testified, with the aid of an interpreter, that he wanted to return to work as soon as possible and would have accepted any position that allowed him to work within his medical restrictions. The Claimant's daughter stated her father began searching for jobs by looking in local newspapers and reviewing employment opportunities on the provincial online job bank. She testified that she would call all of the prospective employers to inquire about whether the job could be performed with her father's restrictions.

[17] The Claimant provided a list of 69 companies who his daughter had contacted to inquire about employment opportunities from September 12, 2018 to December 14, 2018. The notes include the date of the inquiry, contact telephone numbers for the company and the company's answer regarding job availability. The Claimant's daughter stated to the Commission and the Tribunal, that the majority of companies indicated they did not have a job that would allow the Claimant to work within his medical restrictions. The Claimant's daughter stated three companies indicated they had positions in which the Claimant could work, but only one company had an opening in one of these positions.

[18] In December 2018, the Commission suggested the Claimant visit an employment counselor to assess his employment prospects. In January 2019, the Claimant and his daughter visited the employment counselor. The Commission submitted notes from a conversation with

the counselor dated January 7, 2019, in which she told the Commission that the Claimant “really wants to work, he’s open and willing.” She further states there are several opportunities in manufacturing or shipping departments that would suit the Claimant’s physical abilities. She tells the Commission that the Claimant is very open to work and has a good attitude.

[19] The desire to return to work must be sincere, demonstrated by the attitude and the conduct of the claimant.⁶

[20] No matter how little chance of success a claimant may feel a job search would have, the *Act* is designed so that only those who are genuinely unemployed and actively seeking work will receive benefits.⁷ It is not enough for claimant to say that he available for work, he must demonstrate his availability by actively looking for work.⁸

[21] I am satisfied the Claimant had a desire to return to the labour market as soon as a suitable job was offered and demonstrated that desire through efforts to find a suitable job from September 10, 2018 to December 28, 2018. The Claimant and his daughter provided detailed, credible testimony to support that he made a serious, continual and intensive job search which included searching online job database sites and local newspaper ads, submitting his resume to prospective employers, and networking with friends and family. This is supported by his documented job search history over this period of time.

[22] I am also satisfied the Claimant did not set any personal conditions that might have unduly limited his chances of returning to the labour market. The Claimant’s job search supports that he did not restrict his job search in any way other than for his medical restrictions.

[23] Based on the foregoing, I find the Claimant met his burden of proof to show that he was available for work from September 10, 2018 to December 28, 2018. As a result, the Claimant is not disentitled from receiving benefits under paragraph 18(1)(a) of the *Act*.

⁶ *Canada (Attorney General) v. Whiffen*, A-1472-92

⁷ *Canada (Attorney General) v. Cornelissen-O’Neill*, A-652-93

⁸ *Canada (Attorney General) v. Renaud*, 2007 FCA 328

Was the Claimant making reasonable and customary efforts to find suitable employment from September 10, 2018 to December 28, 2018?

[24] The criteria to consider when determining whether a claimant is making reasonable and customary efforts to obtain suitable employment include a number of specified job searching activities.⁹

[25] The Claimant's daughter testified to the Claimant's job search efforts since he made his claim for regular employment insurance benefits on September 12, 2018. She stated the Claimant would assess employment opportunities in the local newspapers, as well as through online job database sites, such as the provincial job bank and others. The Claimant and his daughter would ask their friends and family members about potential jobs for the Claimant. The Claimant also submitted his resume to prospective employers that had positions within his medical restrictions; though, the Claimant's daughter stated that he was not contacted by any employers for an interview during this time. The Claimant's job search history indicates that he began seeking employment immediately after making his claim for regular employment insurance benefits on September 12, 2018, and continued his job search activities throughout the period in question.

[26] Based on the Claimant's submissions, I am satisfied the Claimant engaged in many of the job search activities listed in the *Employment Insurance Regulations*¹⁰ and that his efforts were sustained throughout the period of time in question. I also find there is sufficient evidence to prove the Claimant's effort were directed toward obtaining suitable employment, as his job search indicates he was seeking employment in line with his medical restrictions.

[27] I therefore conclude the Claimant has met his burden of proving he was making reasonable and customary efforts to find suitable employment from September 10, 2018 to

⁹ The full criteria to be considered when determining whether a claimant made reasonable and customary efforts to find suitable employment are listed in the *Employment Insurance Regulations*, section 9.001.

¹⁰ The job search activities are listed in the *Employment Insurance Regulations*, paragraph 9.001(b).

December 28, 2018. As a result, the Claimant is not disentitled from receiving benefits under subsection 50(8) of the *Act*.

CONCLUSION

[28] The appeal is allowed.

Catherine Shaw

Member, General Division - Employment Insurance Section

HEARD ON:	February 28, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. A., Appellant/Claimant R. W., Representative for the Appellant/Claimant