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

Citation: *M. L. v Canada Employment Insurance Commission*, 2019 SST 452

Tribunal File Number: AD-18-836

BETWEEN:

M. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: May 16, 2019

DECISION AND REASONS

DECISION

[1] The decision of the General Division is confirmed.

[2] While the General Division erred in how it made its decision, I have made the decision that the General Division should have made and I still find that the Claimant is disentitled to benefits.

OVERVIEW

[3] The Appellant, M. L. (Claimant), left Canada to have surgery for a medical condition. The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant was disentitled to Employment Insurance benefits while she was outside of Canada because she had not proved that her medical procedure was not readily or immediately available in Canada. The Commission maintained this decision after the Claimant requested a reconsideration.

[4] The Claimant appealed to the General Division of the Social Security Tribunal but her appeal was dismissed. She now appeals to the Appeal Division.

[5] I have made the decision that the General Division should have made and I confirm that the Claimant has not proven that her medical procedure was not readily or immediately available in Canada.

ISSUES

[6] Did the General Division fail to observe a principle of natural justice by failing to give the Claimant an opportunity to provide her medical evidence?

[7] Did the General Division err in law by interpreting the law to require that the Claimant's health concerns be urgent in order for her to access benefits outside of Canada?

[8] Did the General Division make an erroneous finding that the Claimant's medical treatment was not immediately or readily available in Canada

a) based on a misunderstanding that the Claimant's condition had improved since surgery was recommended?
b) based on a misunderstanding that the Claimant did not know that she required surgery?
c) without regard for her experience with the surgical wait-time for her particular condition?

ANALYSIS

[9] The Appeal Division may intervene in a decision of the General Division only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in section 58(1) of the *Department of Employment and Social Development Ac*t (DESD Act).

[10] The grounds of appeal under section 58(1) are as follows:

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.

Issue 1: Did the General Division fail to observe a principle of natural justice by failing to give the Claimant an opportunity to provide her medical evidence?

[11] The Claimant argued that she had been asked about medical documentation and did not understand that she should provide it to the General Division. I have reviewed the audio recording of the General Division hearing, and the Claimant spoke about "EI" not having asked her for her history[1], but that she could have obtained confirmation from her specialist that she had been on the wait-list for surgery. She told the General Division that she could get this evidence if she needed it, but did not ask the General Division whether it was interested to see it, or if she could have an opportunity to send it in.

[1] Audio recording of General Division decision at timestamp 51:35

[12] The Claimant stated to the Appeal Division that she would have supplied the evidence if she had known the General Division would have wanted to see it. This could be understood to be an argument that the General Division failed to observe her natural justice right to be heard.

[13] The Claimant also said that she provided the documentation to the General Division after the General Division decision. There is no record that the General Division received new evidence from the Claimant either before or after its decision. However, the Claimant did provide new evidence to the Appeal Division which included a medical report. Given that the Claimant mistakenly referred to both the Appeal Division and the Commission as the General Division in her oral argument, I will take it that she was actually describing the medical report that she attached to her submission to the Appeal Division dated March 7, 2019.

[14] While the Appeal Division cannot generally consider new evidence, I reviewed the medical report in this case for the purpose of assessing whether the Claimant's right to be heard may have been compromised. The report appears to be an ultrasound diagnostic report prepared post-surgically. It confirms that the Claimant had the myomectomy surgery and suggests that the Claimant developed a hematoma.

[15] Even if it could be said that the General Division ought to have done more to ensure that the Claimant had the opportunity to present additional evidence post-hearing, the evidence that the Claimant would have presented was of little significance to the decision. The Claimant had already provided medical evidence to the Commission that confirmed the nature of her surgery in her home country, as well as some relevant particulars of the course of her condition and anticipated recovery. This was in the file available to the General Division. Furthermore, the General Division decision does not challenge the fact of her surgery or of her post-surgical hematoma.

[16] I do not find that the General Division decision failed to observe the Claimant's natural justice rights by not suggesting that she should submit this additional medical evidence after the hearing.

Issue 2: Did the General Division err in law by interpreting the law to require that the Claimant's health concerns be urgent in order for her to access benefits outside of Canada?

[17] The General Division repeatedly states that the Claimant must prove that her medical treatment was not readily **and** immediately available in Canada.[2] This is not the test. Section 55 of the *Employment Insurance Regulations* (Regulations) requires a Claimant to prove that the treatment was not readily **or** immediately available, which means that the readily available and immediately available are independent, and alternative criteria. If the Claimant were able to prove that the medical treatment was immediately available but difficult to access, readily available but delayed somewhat, or difficult to access as well as delayed, the Claimant would not be disentitled.

[18] The General Division's requirement that the Claimant prove that the treatment was both difficult to access and delayed is an error of law.

[19] Furthermore, I read the General Division decision as having concluded that the treatment was not immediately available based on its finding that the Claimant's requirement for treatment was not urgent. There is some attraction to linking the definition of immediately available to the immediacy of need, but nothing there is nothing in the Regulation or in any judicial interpretation to suggest that the determination that treatment is not immediately available in Canada is dependent on whether the treatment is immediately required by a claimant. Ultimately, the determination of urgency is a value judgment: A condition may not be life-threatening but might offer pain relief, enhance mobility, or offer any number of other beneficial effects such that a claimant considers it important that the treatment occur as soon as possible. The General Division should not be making value judgments as to the urgency of the Claimant's complaint for the purpose of determining whether, in the circumstances, the treatment is immediately available.

[20] I find that the General Division erred in law in its interpretation of section 55(1)(a) of the Regulations and, in particular, its application of the criteria of "readily and immediately available".

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[2] General Division decision, para. 11, 14, 15

Issue 3(a): Did the General Division make an erroneous finding that the Claimant's medical treatment was not immediately or readily available in Canada based on a misunderstanding that the Claimant's condition had improved since surgery was recommended?

[21] As noted above, the urgency of the Claimant's condition is not relevant to the section 55(1)(a) test. However, the General Division appeared to think it was, and it based its decision, at least in part, upon this finding.

[22] In December 2017, the Claimant has a severe flare in her condition resulting in severe pain and paralysis. The General Division considered it significant that the Claimant's symptoms had improved by the time she saw her doctor and prior to leaving the country to seek medical treatment. This was the foundation for its finding that her health concerns were not urgent.

[23] The General Division appears to have understood the Claimant's improvement to be a permanent improvement or a return to what had been her normal health status before the flare up. In fact, the Claimant remained symptomatic with continuing constipation and pain.[3] Prior to her flare, the Claimant had previously been relatively symptom-free which is why she had opted to cancel scheduled surgery to go on to a fertility wait list instead. While the Claimant's paralysis resolved and the pain subsided, the Claimant had been monitoring the growth of her fibrosis and she determined that she should have the surgery since her condition was now symptomatic. In her testimony, the Claimant said that the doctors "couldn't do anything", but the context suggests she was speaking about her symptom flare, and about the fact that she would have had to be tested while she was still experiencing the symptom flare to determine its cause.[4] She stated she left Canada to obtain treatment because she could not wait:[5] the symptoms were coming more often.[6] When she had been asymptomatic, her doctor had been reluctant to "touch",[7] but now that she was symptomatic, she needed the surgery.[8]

[24] The evidence before the General Division suggests that the symptom flare episode represented a development in the progression of the course of the underlying condition. The

[3] Audio recording of General Division decision at timestamp 33:15
[4] *Ibid.* 31:25
[5] *Ibid.*35:50
[6] *Ibid.*36:30
[7] *Ibid.* 37:20
[8] *Ibid.*37:30

General Division seems to have understood that, as the flare receded, so did the need for treatment, or the "urgency". However, that conclusion is not supported when all the evidence is considered in context. In my view, the General Division based its decision on a misunderstanding of the Claimant's evidence, which is an error under section 58(1)(c) of the DESD Act.

Issue 3(b) Did the General Division make an erroneous finding that the Claimant's medical treatment was not immediately or readily available in Canada based on a misunderstanding that the Claimant did not know that she required surgery?

[25] The discussion above is also relevant to whether the Claimant knew that she required the surgery. It was the General Division member that suggested to the Claimant that her symptoms were getting better "so surgery is not an option", but the Claimant denied this, saying that she talked to her doctor and that she knew she needed the surgery.[9]

[26] The General Division also relied on the fact that the Claimant did not know if she was going to have the surgery when she left Canada, until the specialist in her home country made the decision. This is correct. However, the reason the Claimant did not know if she would have the surgery is that she not know whether that doctor would or could perform the surgery. Her evidence was clear that she understood that her condition required surgery.

[27] The General Division appears to have based its decision that the surgery was immediately available in Canada in part on the erroneous finding that the Claimant did not know she required surgery, which is based on a misunderstanding of the Claimant's evidence on this point. I find that the General Division erred under section 58(1)(c) of he DESD Act.

Issue 3(c) Did the General Division make an erroneous finding that the Claimant's medical treatment was not immediately or readily available in Canada without regard for her experience with the surgical wait-time for her particular condition?

[28] The General Division determined that the Claimant could not prove that her treatment was not readily available because she did not speak to her specialist before leaving Canada to obtain the surgery. It is not clear from the Claimant's testimony whether she had discussed the increase or change in her symptoms with her family doctor, but she had known that she would

[9] *Ibid.*36:40

need the surgery if she became symptomatic. The General Division is correct that she did not see her specialist before leaving Canada.

[29] The General Division also understood that the Claimant had been on the wait-list for the same surgery before, and was finally scheduled for surgery in 2016 after a year on the wait-list.[10] The Claimant indicated that she thought she would have to again wait a year based on this past experience. This evidence is significant and relevant to the determination of how swiftly the Claimant could get the surgery in Canada.

[30] The General Division does not appear to have given any weight to, or to have analyzed, the Claimant's own experience about a year earlier with the wait-time in Canada for the same procedure to treat the same condition. Its conclusion relies solely on the fact that the Claimant did not consult with her specialist before she left Canada to confirm how quickly she could obtain the same treatment in Canada.

[31] The General Division either ignored the Claimant's wait-time experience to make its finding that she had not shown that the treatment was not readily or immediately available, or it considered the fact that the Claimant did not get an update on wait-time for surgery to be so compelling that the Claimant's past experience would have made no difference. If the General Division ignored the Claimant's experience, then I would consider this to be an error under section 58(1)(c) of the DESD Act. If the General Division simply gave more weight to the fact that the Claimant did not ask her specialist to update her in late 2017 on the availability of surgery, then the means by which it weighed and analyzed the evidence is not apparent. The inadequacy of the reasons would still amount to an error of law under section 58(1)(b) of the DESD Act.

CONCLUSION

[32] The Claimant has established grounds for appeal under section 58(1) of the DESD Act. I will now consider the appropriate remedy.

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[10] General Division decision, para. 9

REMEDY

[33] I have the authority under section 59 of the DESD Act to give the decision that the General Division should have given, refer the matter back to the General Division with or without directions, or confirm, rescind or vary the General Division decision in whole or in part.

[34] I consider that the appeal record is complete and that I may therefore give the decision that the General Division should have given.

[35] Section 37(a) of the EI Act states that, except as may otherwise be prescribed, a person is not entitled to receive benefits for any period in which the person is not in Canada. The prescribed exceptions are found in section 55 of the Regulations. Section 55(1)(a) is the exception applicable to the Claimant's circumstances. It allows that a claimant is not disentitled while outside of Canada if he or she is outside Canada for the purpose of undergoing medical treatment that is not readily or immediately available in Canada.

[36] The Claimant had a surgical procedure in the country of her former residence for the purpose of removing uterine fibroids. She did not argue that she could not obtain the particular procedure in Canada or that it would be unduly difficult to have it done in Canada. However, she did suggest that the procedure was not immediately available because she had been on a wait-list for the surgery previously and had waited a year before the surgery was scheduled. She had personal reasons for declining the surgery at that time, and she lost her place on the wait list. The Claimant's argument rests on the premise that it would take a long time to get the surgery in Canada because it had taken so long for it to be scheduled in 2016. She relied on her own recent experience in Canada with an approximate delay of one year on the wait-list for the same procedure to treat the same condition.

[37] I accept that a medical treatment in Canada for which a patient is required to wait in the order of one year, is not an immediately available treatment for the purposes of section 55(1)(a) of the Regulations. However, the question is whether the Claimant has actually proven that she would have had to wait such a long time in Canada for the surgery, at the time she left the country to access the surgery, that it could not be said to be immediately available in Canada. The Claimant has the onus

of establishing on a balance of probabilities that the medical treatment was not immediately available in Canada.[11]

[38] The Claimant testified to a change in her condition. At the time, or during the time, that the Claimant had originally been on the wait-list for surgery, her fibroids had been fairly symptom-free, such that her work priorities and her desire for fertility treatment took priority. She even removed herself from the wait-list when her surgery was finally scheduled cancelled. However, this changed when the Claimant suffered an acute attack involving significant pain and even temporary paralysis. The Claimant understood from her own research that the onset of symptoms[12],or increased frequency of symptoms[13], meant that she could no longer put off the surgery. It was at this point that she decided she would have to leave the country to get treatment.

[39] The General Division apparently relied on the fact that the Claimant had not spoken to her specialist before leaving Canada for treatment which, to the General Division, meant that she could not prove that her treatment was not immediately available. I consider that it is also relevant that the Claimant had some personal knowledge of the wait-time for the type of treatment she required. However, the Claimant decided to go leave Canada because of a *change* of symptoms which she understands to be a progression of the disease course. The one-year wait-time in the Claimant's experience applied to what was then an asymptomatic condition during a period in which the Claimant was able to work without difficulty. Effectively, it was the wait-time for "elective" surgery.

[40] I have already found that it would be an error to find that a procedure must be immediately available if the need for the procedure is not urgent. However, I do accept that the urgency of the condition for which treatment is sought would be likely to have an effect on the scheduling of treatment for that condition. While I appreciate that the Claimant assumed that she would have to wait up to a year for the surgery in Canada, her previous experience with wait-times cannot be presumed to reflect her ability to access treatment in December 2017, when her fibroids had progressed to where they were causing her pain, could interfere with her employment, [14] and where they could conceivably produce more episodes of severe pain and paralysis.

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[11] *Peterson v. Canada (Attorney General),* A-370-95
[12] *Supra* note 3 at 34:40
[13] *Ibid.*36:10
[14] *Ibid.*35:20

[41] The Claimant has not provided any evidence of how quickly her surgery could have been scheduled in Canada at the end of 2017 when she was presenting with significant symptoms. The Claimant spoke to her family doctor about her intention to go outside Canada for surgery[15] but she has not said what her doctor's reaction was or whether he offered any recommendations or cautions. The Claimant did not consult her specialist to describe the developments in her condition that motivated her to decide she could not wait for the surgery.

[42] The Claimant's evidence of wait-times is a year out of date, and related to a condition whose treatment, at that time, was of little urgency. The medical reports on file do not speak to either the urgency of the Claimant's need for surgery or its availability in Canada.

[43] I find that the Claimant has not established on a balance of probabilities that the medical treatment she obtained outside of Canada, was not readily or immediately available in Canada.

[44] The General Division decision that the Claimant is disentitled to benefits under section 37 of the EI Act, while she was outside of Canada, is confirmed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	May 7, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. L., Appellant

[15] *Ibid.*43:45