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

Citation: *S. B. v Canada Employment Insurance Commission*, 2019 SST 554

Tribunal File Number: AD-19-366

BETWEEN:

S. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: June 7, 2019

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant, S. B., applied for and received Employment Insurance (EI) sickness benefits for the maximum of 15 weeks, in August to November 2014. He also applied for Workplace Safety Insurance Board (WSIB) compensation in 2014 and received WSIB payments in 2016. He arguably received EI sickness benefits and WSIB compensation corresponding to the same period.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the WSIB payments were earnings and allocated them against the Applicant's EI claim. The allocation resulted in an overpayment of EI benefits that the Applicant was required to repay. The Applicant requested reconsideration of the Commission's decision.

[4] The Commission maintained its decision that the Applicant's WSIB payments constituted earnings and these earnings were allocated to the week starting on August 17, 2014, to the week of November 29, 2014. A portion of the WSIB compensation had been paid directly to the Commission by WSIB and had been applied to the Applicant's EI overpayment. An overpayment of $557.68 remains to be repaid.

[5] The Applicant appealed the Commission's decision to the General Division of the Social Security Tribunal of Canada. The General Division found that the money received by the Applicant constituted earnings and that the Commission had correctly allocated those earnings.

[6] The Applicant seeks leave to appeal the General Division decision on the basis that the General Division made an important error regarding the facts in the appeal file. He maintains that he never received money from different sources simultaneously.

[7] The appeal does not have a reasonable chance of success because the Applicant simply repeats arguments that he made to the General Division and does not raise any reviewable errors.

ISSUE

[8] Is there an arguable case that the General Division made an error of law or a serious error in its findings of fact by concluding that the Applicant received earnings and that the Commission correctly allocated those earnings?

ANALYSIS

[9] An applicant must seek leave to appeal in order to appeal a General Division decision. The Appeal Division must either grant or refuse leave to appeal, and an appeal can proceed only if leave to appeal is granted.[1]

[10] Before I can grant leave to appeal, I must decide whether the appeal has a reasonable chance of success. In other words, is there an arguable ground on which the proposed appeal might succeed?[2]

[11] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success[3] based on a reviewable error.[4] The only reviewable errors are the following: the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; erred in law in making its decision, whether or not the error appears on the face of the record; or 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.

[12] The Applicant submits that the General Division was wrong because he received EI benefits in 2014 and WSIB lump sum payments in 2016 and periodic payments after that (as a settlement for his WSIB claim). He also argues that his questions to the General Division member were not answered or dealt with to his satisfaction.

[13] The issues before the General Division were whether the WSIB compensation payments are earnings that must be allocated against the Appellant's EI claim for sickness benefits and, if

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[1] *Department of Employment and Social Development Act* (DESD Act), ss 56(1) and 58(3).
[2] *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12; *Murphy v Canada (Attorney General)*, 2016 FC 1208 at para 36; *Glover v Canada (Attorney General)*, 2017 FC 363 at para 22.
[3] DESD Act, s 58(2).
[4] *Ibid*. s 58(1).

so, whether the WSIB compensation was allocated correctly.

Is there an arguable case that the General Division made an error of law or a serious error in its findings of fact by concluding that the Applicant received earnings and that the Commission correctly allocated those earnings?

[14] I find that there is no arguable case that the General Division erred in law or 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.

Error of law

[15] The definition of "earnings" to be taken into account for allocation purposes includes "workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments."[5] The General Division interpreted this provision as meaning that periodic payments of WSIB are earnings and must be allocated to the weeks in which they are "paid or payable".[6] It also concluded that the *Employment Insurance Act* (EI Act) expressly provides that a claimant's sickness benefits will be reduced or eliminated if there are any other benefits payable under provincial law as a result of the illness, injury or quarantine.[7]

[16] The General Division correctly stated and interpreted the applicable legislative provisions.

[17] The General Division noted that the onus was on the Applicant to prove that the payments were not earnings and, therefore, should not be subject to allocation[8] and to prove that the Commission's allocation of the WSIB monies had been done improperly. This was a correct statement of the standard of proof.

[5] *Employment Insurance Regulations* (EI Regulations), s 35(2)(b).
[6] EI Regulations, s 36(12).
[7] *Employment Insurance Act*, s 21(2).
[8] General Division decision at para 8

[18] The Applicant maintains that he did not receive EI benefits and WSIB benefits at the same time (or concurrently or simultaneously). He argues that the WSIB payments should have been allocated to another period when he was not on an EI claim.

[19] The General Division concluded that workers' compensation payments that are "received or to be received" must be allocated to the weeks in which they are "paid or payable". The General Division noted that although the first WSIB payments were not paid until December 2016, "they fall squarely within the benefits identified … As such, they must be allocated against [the Applicant's] claim for sickness benefits."[9]

[20] The General Division referred to and applied the definitions and legal principles set out in the EI Act and the EI Regulations on the issues of earnings and allocation in this matter.[10]

[21] There is no arguable case that the General Division made an error of law. The appeal has no reasonable chance of success based on this ground.

Error in the Findings of Fact

[22] The Applicant alleges the following specific errors in the General Division's findings of fact:

a) The Applicant applied for sickness benefits on April 2, 2014[11] – he says this is false.

b) EI benefits and WSIB compensation were concurrently paid – he maintains that he did not receive these amounts concurrently.

[23] The Applicant first applied for regular EI benefits on March 24, 2014.[12] He spoke with a Commission agent on April 2, 2014 and said he had applied for the wrong type of benefit.[13] The Applicant asked for his claim to be considered as a sickness benefits claim on April 2, 2014.

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[9] General Division decision.at para 16.
[10] *Ibid.* at paras 4-10 and 16.
[11] *Ibid.* at para 10 and 17.
[12] GD3-3 to 9 – Application for EI benefits.
[13] GD3-11 to 13 – Telephone conversation log and Conversion to sickness benefits.

[24] The General Division did not make an error in its findings of fact when it stated that the Applicant applied for sickness benefits on April 2, 2014.

[25] The General Division stated that the Applicant was eligible for WSIB compensation payments concurrently with his claim for employment insurance benefits.[14] The General Division did not find that the Applicant received these amounts concurrently, only that he was eligible for WSIB and EI benefits concurrently. The General Division actually found that the Applicant received EI benefits and WSIB compensation at different times.[15]

[26] The time when the Applicant received WSIB compensation was not of much importance. The finding that the WSIB compensation, with periodic payments, was for loss of earnings due to the same workplace injury upon which the Applicant established his claim for EI sickness benefits was the crucial finding of fact. The Applicant had testified unequivocally on this point.[16]

[27] The General Division reviewed the summary of allocation and found that the net overpayment was $557.68. The Commission was asked to explain the difference between its calculation of the overpayment owing and the Applicant's, which it did in writing. The General Division found that the allocation had been done correctly and confirmed the Commission's calculation.

[28] The General Division considered the evidence in the documentary record. It also considered the testimony that the Applicant gave during the in-person hearing and his arguments.

[29] The Applicant seeks to reargue his case at the Appeal Division using arguments similar to those he made at the General Division. Simply repeating his arguments falls short of disclosing a ground of appeal that is based on a reviewable error.

[30] The appeal has no reasonable chance of success based on the ground of serious error in the findings of fact.

[31] The application for leave to appeal refers to questions that the Applicant had asked the

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[14] General Division decision.at para 2.
[15] General Division decision at para 16.
[16] *Ibid.*

General Division member. The Applicant submits that his questions were not answered or were not mentioned in the General Division decision.

[32] It is not necessary to mention, in the General Division decision, every question that the Applicant raised. The General Division did not have to answer the questions asked of it by the Applicant.[17] Further, the General Division did not have to convince the Applicant that its interpretation of the law and the Commission's allocation of the earnings were to the Applicant's satisfaction. The General Division correctly stated that the Applicant had the burden of proof. I would add that at no point does the burden of proof shift to the Tribunal.

CONCLUSION

[33] I am satisfied that the appeal has no reasonable chance of success, so the application for leave to appeal is refused.

Shu-Tai Cheng
Member, Appeal Division

REPRESENTATIVE:	S. B., self-represented

[17] *Langlois v Canada (Attorney General)*, 2018 FC 1108.