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

Citation: *M. L. v Canada Employment Insurance Commission*, 2019 SST 674

Tribunal File Number: AD-19-263

BETWEEN:

M. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: July 26, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed in part. The Claimant was capable of and available for work but only up to and including May 3, 2017.

OVERVIEW

[2] The Appellant, M. L. (Claimant), first applied for Employment Insurance benefits in February 2016 but returned to work at his regular employer in September 2016. Because of the periodic nature of his employment, the Claimant maintained an active benefit claim, and declared his earnings from employment in weekly reports from September 2016 to January 2017.

[3] The Claimant completed a project for his employer on January 5, 2017, and stopped work again. The Respondent, the Canada Employment Insurance Commission (Commission), later investigated a possible overpayment related to his reported earnings, and learned that the Claimant had an illness or disability. The Commission determined that the Claimant had left his work on January 5, 2017, because of this illness or disability and that he should not have received regular benefits. It allowed that the Claimant was entitled to 15 weeks of sickness benefits from January 5, 2017, to April 24, 2017, but that he was ineligible to receive benefits for the remainder of his benefit period because he had not been capable of and available for work.

[4] The Claimant requested a reconsideration, but the Commission maintained its decision. The Claimant's appeal to the General Division of the Social Security Tribunal was dismissed and he is now appealing to the Appeal Division.

[5] The appeal is allowed in part. The Claimant was capable of and available for work in the period between the completion of his last job on January 5, 2017, and May 3, 2017, the date of his Record of Employment (ROE).

ISSUE(S)

[6] Is there an arguable case that the General Division ignored or misunderstood evidence that the Claimant was physically capable of working from January 2017 to the conclusion of his claim in August 2017?

[7] Did the General Division err in law by failing to correctly apply the legal test to determine the Claimant's availability for work?

ANALYSIS

[8] 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 *Department of Employment and Social Development Act* (DESD Act).

[9] The only grounds of appeal 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 before it.

Issue 1: Is there an arguable case that the General Division ignored or misunderstood evidence that the Claimant was physically capable of working from January 2017 to the conclusion of his claim in August 2017?

[10] The General Division understood that the Claimant believed he was ready, willing and capable of work from January 2017 until August 2017; just not in his usual field of employment working as an equipment operator. The General Division also understood the Claimant to be saying that he could have worked in an office setting, having a less stressful work environment.[1]

[1] General Division decision, para. 15

[11] The Claimant did not dispute that his last day of work was January 5, 2017, but he maintained throughout his testimony that he remained available, waiting in X, Alberta for the "next job" to come up with his regular employer.[2] He testified that it was normal for the work to go "up and down" working on the pipeline and for him to have to wait for the next job to start.[3] He also said it was usual for him to be off work, and then get a phone call and have to return to work; This is what he thought was going on after his last job completed in January 2017.[4] The Claimant testified that he was also trying to find other work because he had a fresh mortgage.[5]

[12] The Claimant was eventually diagnosed with ataxia[6] which he described as a condition that affected his gait. He testified that he moved from X back to his home in British Columbia (BC) in December 2017, because it was easier and quicker to see specialists for his condition, as well as for personal reasons. When the General Division member told the Claimant that he understood the Claimant had not been looking forward to going back to his previous job because of his medical problem[7], the Claimant agreed. However, he said that this had been in December (after he had moved back to BC).[8] The Claimant emphasized that he had been totally capable of driving equipment and doing his old job–his only problem was that his walking was "off".[9]

[13] The Claimant had attached a written statement that he had attached to his reconsideration request.[10] This written statement is the only evidence from which the General Division could have drawn its understanding that the Claimant had not believed himself capable of his usual work since January 2017. In that statement, the Claimant stated that he was not incapable of work until the end of August 2017 after he had a seizure. He began the next paragraph by saying that, "[He] was ready, willing and capable of employment, just not with [his] current position operating heavy equipment in a high paced, stressful job environment". The Claimant wrote that he searched for work such as office work or dispatching but had no experience with desk jobs.

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[2] Audio recording of General Division hearing at timestamp at 00:07:20
[3] Audio recording of General Division hearing at timestamp at 00:07:40
[4] Audio recording of General Division hearing at timestamp at 00:08:10
[5] Audio recording of General Division hearing at timestamp at 00:6:45
[6] Audio recording of General Division hearing at timestamp at 00:11:20
[7] Audio recording of General Division hearing at timestamp at 00: 12:35
[8] Audio recording of General Division hearing at timestamp at 00:13:10
[9] Audio recording of General Division hearing at timestamp at 00:13:25
[10] GD3-34

[14] The meaning of the Claimant's written statement is ambiguous. It could be read to mean that he considered himself capable of work from his last day of work in January 2017, but that he was not capable of working at his regular job. Alternatively, the Claimant's statement could be read to mean that he considered himself capable of his regular job from his last day of work until August, but that he did not feel capable of his regular job after that so he looked for alternate work.

[15] The General Division did not put the Claimant's statement to him directly and the Claimant did not offer any clarification, or explicitly reconcile the statement with his testimony. However, the Claimant testified that he was waiting to be called back to his regular job (as opposed to actively applying for other employment similar to his regular job) at least until August. He mentioned that he had also been looking for other work. This testimony is consistent with the second "alternative" interpretation of his written statement only (see above). The General Division did not challenge the Claimant's testimony on this point.

[16] The difficulty I have with the General Division decision is not that the General Division member failed to put the Claimant's statement to him in the hearing. The problem is that the General Division did not once refer to the entire body of the Claimant's testimony.

[17] In his testimony, the Claimant insisted that he had been capable of his regular employment from January 5, 2017, at least until August 2017. This was clearly his position and his claim. The General Division could choose to interpret the Claimant's earlier statement in a manner that was inconsistent with his testimony, and to then prefer that earlier statement over his testimony. However, if it did so, the General Division would still need to explain how it interpreted the Claimant's written statement, state that it preferred the written statement, and give reasons why it was doing so.

[18] The Claimant's testimony that he was capable of his regular job and waiting to be called back was relevant to the General Division's finding that the Claimant had not made sustained and directed efforts at a job search. If the General Division had believed the Claimant's testimony, the Claimant's evidence would have undermined the finding, and the significance of the finding. The decision in *Canada (Attorney General) v. MacDonald* [11] suggests that a claimant who expects to be recalled to his regular job may not be required to conduct the same kind of job search, as extensive a search, or perhaps any additional job search. In *MacDonald,* the Federal Court of Appeal upheld a decision that

[11] *Canada (Attorney General) v. MacDonald*, A-672-93

had confirmed that an appellant was available for work even she, "was only willing to accept work from [her employer] with which she had been employed for some time, although, at the material times, the employment was intermittent".

[19] I find that the General Division member failed to consider the Claimant's testimony that he had remained capable of working at his regular job at least until August 2017, and that he was waiting for recall to his regular employer. I also find that this evidence was significant and relevant to the General Division's finding that the claimant had not made sustained and directed efforts at a job search, and that the General Division decision was based on this finding.[12]

[20] Therefore, the General Division based its decision on an erroneous finding of fact that failed to consider the Claimant's testimony which is an error under section 58(1)(c) of the DESD Act.

[21] Alternatively, the General Division erred in law under section 58(1)(b) by failing to provide adequate reasons to explain why it preferred the Claimant's written statement in support of his reconsideration over his oral testimony. I note that the General Division did not suggest to the Claimant in the hearing, or in its decision, that the Claimant's earlier written statement was inconsistent with his testimony. Nor did the General Division make any adverse finding related to the Claimant's credibility.

Issue 2: Did the General Division err in law by failing to correctly apply the legal test to determine the Claimant's availability for work?

[22] The law that is applicable to decisions on disentitlement to benefits for non-availability for work is found in section 18(1) of the *Employment Insurance Act* (EI Act) and in the decisions of higher courts that interpret the EI Act. The General Division applied the legal test for availability described in the Federal Court of Appeal decision known as *Faucher v. Canada (Attorney General).*[13]

[23] I discussed the General Division's approach to *Faucher* in some detail in my leave to appeal decision when I found that there was an arguable case that the General Division may have misapplied the test. This decision requires that I determine whether the General Division erred on the higher standard of balance of probabilities. I am mindful of the higher standard but I

[12] General Division decision, para. 19
[13] Faucher v. Canada (Attorney General), A-56-96

consider that much of my earlier analysis remains applicable to this determination. For the sake of completeness, I will be incorporating some of that earlier analysis into this decision.

[24] According to section 18(1)(a) of EI Act, the Claimant is only entitled to benefits for working days for which the Claimant can prove he was capable of and available for work and unable to obtain suitable employment (except for the 15-week period in which the Commission paid sickness benefits to the Claimant). According to *Faucher v. Canada (Attorney General)*[14], availability for work **must** be determined by analyzing three factors.

[25] Those three factors are:

a) a desire to return to the labour market as soon as suitable employment is offered;

b) the expression of that desire through efforts to find a suitable job, and;

c) not setting personal conditions that might unduly limit the chances of returning to the labour market.

[26] The General Division effectively considered only the second of the three *Faucher* factors. The General Division examined the Claimant's efforts with reference to section 50(8) of the EI Act and section 9.001 of the *Employment Insurance Regulations* (Regulations). Section 50(8) of the EI Act states that, for the purpose of proving that a claimant is available for work and unable to obtain suitable employment (which is section 18(1)(a) of the EI Act), the Commission may require a claimant to prove that her or she is making reasonable and customary efforts to obtain suitable employment. Section 9.001 of the Regulations sets out the criteria for determining whether a claimant has made reasonable and customary efforts. Section 9.001 lists the usual types of reemployment efforts and it requires that the efforts be both sustained and directed towards suitable employment, as noted by the General Division.[15]

[27] The General Division was not satisfied that the evidence supported a sustained and directed search and stated that the Claimant had not supplied details of his job search efforts.[16] It

[14] Faucher v. Canada (Attorney General), A-56-96
[15] General Division decision, para. 11
[16] Ibid, para. 18.

found that he had not met the burden of proving he was capable of and available for work through his job search efforts. Instead, it found that he was not available for work due to illness.[17] However, the General Division did not separately analyze or determine the other two *Faucher* factors.

[28] The General Division understood the Claimant to be asserting a willingness and ability to return to "office" work from January 5, 2017, onward, rather than to return to his usual job as a heavy equipment operator. [18] However, it did not accept this to be the case. It found that the evidence did not support that the Claimant was ready, willing and capable of work based on the doctor's note, his ROE and his application for CPP and EI sickness benefits. The General Division did not otherwise examine whether alternative office-type employment was "suitable" in light of the Claimant's illness or disability as required to apply section 18(1)(a) of the EI Act or the *Faucher* factor analysis.

[29] The third *Faucher* factor would require the General Division to determine whether any self-imposed job search restrictions were "unduly" limiting. The General Division excluded the possibility that the Claimant had the physical ability to return to his regular employment,[19] even if he had been recalled to work. As a result, the General Division appears to have considered only the adequacy of his search for some *alternate* employment and it did not consider whether he had unduly limited himself in that search.

[30] If the Claimant had restricted himself to seeking certain jobs or accepting certain assignments, it may well have been appropriate that he exclude heavy equipment operation or similar occupations and to seek alternate work such as office work (as he was understood to have done or intended). This would likely have had an effect on the availability of work to him and his approach to reemployment, and could have affected the General Division's determination on the only *Faucher* factor it considered, which concerned the Claimant's efforts to find a suitable job.

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[17] *Ibid*., para 18
[18] General Division decision, para. 15
[19] General Division decision, para. 19

[31] However, the Claimant's efforts to find work would have to be viewed in a different light entirely if his illness or disability did not necessarily prevent his return to his regular employment.

[32] The Claimant testified that he did have the physical ability to do his regular job, and that he had anticipated a call back to his regular employment in accordance with the practice in the industry and his own experience in his own employment. If the General Division had considered and given weight to the Claimant's testimony, it might have found that that his regular employment remained suitable and that he desired to return to it under the first *Faucher* factor. It might also have found that the Claimant's search for alternate employment would be only supplemental to his main hope and expectation that he would be called back to work with his regular employer. Therefore, it might have reached a different conclusion on the second *Faucher* factor and in the ultimate decision.

[33] I read *Faucher* as requiring an analysis of all three factors. The Commission argued that the General Division's silence on two of the *Faucher* factors does not mean that the General Division neglected to take them into account. It cited *Simpson v. Canada (Attorney General)*[20] for the proposition that the General Division is presumed to have considered and weighed all of the evidence before it. With respect to the Commission, this is nothing like the situation where the General Division fails to refer to *evidence*. The General Division failed to fully analyze the evidence because it did not consider all of the *Faucher* factors to properly apply the legal test. *Simpson* does not apply to an error of law.

[34] I find that the General Division erred in law under section 58(1)(b) of DESD Act by not analyzing the Claimant's circumstances with regard to all three of the *Faucher* factors.

[35] The Claimant has established grounds for appeal under both section 58(1)(b) and Section 58(1)(c) of the DESD Act.

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[20] *Simpson v. Canada (Attorney General)*, 2012 FCA 82

REMEDY

[36] I consider that the General Division record is complete. I will therefore exercise my authority under section 59 of the DESD Act, to give the decision that the General Division should have given.

[37] The decision in this appeal turns on one key question. Was the physically incapable of employment from January 5, 2017, and throughout the period of his claim?

[38] If the Claimant was physically incapable of any kind of employment then I would be compelled to find him incapable of employment under section 18(1)(a) of the EI Act and ineligible for any benefits beyond the sick benefits that would flow from the applicability of section 18(1)(b).

[39] On the other hand, if the Claimant was physically capable of employment, I would need to determine if he was physically capable of his *regular* employment. This is important because his efforts to find a suitable job would have to be assessed differently if he could reasonably expect to be recalled and return to work at his regular employer. If I find that he remained physically capable of his regular employment, I would still have to decide whether he remained capable of and available for work having regard to the three factors described in *Faucher*.

[40] However, if I find that the Claimant was disabled from his regular employment, I could still find that he was physically capable of some form of employment. If I accept that the evidence supports such a finding, I would apply the *Faucher* test to determine whether the Claimant had proven that he was capable of, and available for, other suitable work.

<u>Was the Claimant physically incapable of any employment from employment from January 2017?</u>

[41] In my view, the most important evidence relating to the Claimant's physical capacity to work after January 5, 2017, includes the following:

a) the Record of Employment dated May 3, 2017 (GD3-13);
b) the employer's statement to the Commission of June 4, 2018 (GD3-15);
c) the Claimant's statement to the Commission of August 7, 2018 (GD3-22);

d) Doctor F's note dated August 14, 2018 (GD3-27);
e) the Claimant's written statement dated November 1,2018 and attached to his reconsideration request (GD3-34);
f) the Claimant's statement to the Commission of December 11, 2018 (GD3-35);
g) the Claimant's oral testimony at the General Division.

[42] The ROE indicates that the last day the Claimant was paid was January 5, 2017, and that the Record of Employment was issued because of "illness or injury". When asked about the reason for separation long after the Claimant's last day of work, the employer indicated that the Claimant has some "addiction" issues, had not returned to work, and had moved away. This is the only reference to addiction issues in the file. The employer was not asked on what basis he believed the Claimant had addiction issues and the Claimant was never questioned as to why the employer would have said this. He did not mention the Claimant's actual condition. In his testimony, the Claimant explained that he had been experiencing problems with his gait and equilibrium, which was eventually diagnosed as ataxia.

[43] The Claimant also testified that he completed a particular job in January 2017, but that temporary work shortages were normal. He worked in an industry that was up and down and he continued to expect to be recalled for other jobs. He did not say exactly when he received his 2017 ROE but he said that he discovered the ROE on "the Board" at his employer when he was checking in looking for work. He testified that he had received ROEs in the past so that he could collect EI during temporary work shortages. The Claimant said that he thought nothing of it on this occasion, because he was already receiving benefits on a continuing claim.

[44] The ROE is dated May 3, 2017, and there is nothing in the ROE, or in the Commission's interview with the employer, to contradict the Claimant's assertion that he was still employed in the period before that date, or that he was capable of work and waiting to be recalled.

[45] The Commission did not challenge the Claimant's declaration of capacity until it questioned him on August 7, 2018, as to the date he was first incapacitated from work. The Commission's notes state that the Claimant was asked if he "had recovered since leaving his job

on January 5, 2017, and returned to work"[21] and the Claimant responded that he cannot work and has not recovered and that he had applied for CPP.

[46] The question was an awkward one. The Commission may have interpreted the Claimant's response to be a declaration that he had not been able to work since January 5, 2017, but that is not the only possible interpretation, or even the most likely interpretation. At the time he was asked the question in August 2018, the Claimant could not work, had not recovered, and had applied for CPP, so his answer might simply be a statement of his then-current status. In addition, the Commission's question appears to be a continuation of a discussion in which the Claimant commented that he had applied for medical benefits but was told he did not have enough hours.

[47] This discussion of sickness benefits can only have been referring to sickness benefits requested sometime after the Claimant received his ROE in May 2017, and likely requested after he had exhausted his benefits in August 2017. In my view, the context suggests that the Claimant meant to update the Commission on his status at the time of the conversation. It does not suggest to me that the Claimant was confirming that he had been disabled from work ever since January 5, 2017.

[48] The Claimant was told that the Commission could look into switching his claim over to sickness benefits. The Commission asked him to obtain a medical note, and the Claimant obtained and submitted a medical note dated August 14, 2018.

[49] Again, the Claimant could easily have understood the Commission's offer and its request for medical proof to be responsive to his dissatisfaction with not being granted any sickness benefits, now that he was no longer able to work because of his ataxia. It seems unlikely that the Claimant would care whether the Commission considered the first 15 weeks of his benefits to be sickness or regular benefits. It would be reasonable to infer that the Claimant obtained and provided this note with the expectation that it would assist him to obtain additional sickness benefits–not replace the first 15 weeks of his regular benefits with sickness benefits.

[21] GD3-22

[50] Dr. F's note, dated one week after the Commission requested the Claimant to provide a medical letter stating the date of his incapacity, was likely prepared for the Claimant at his request and for the Claimant's purpose of obtaining additional sickness benefits. It states that the Claimant was unable to work since January 5, 2017, and that his medical problems are continuing.

[51] However, I do not accept Dr. F's single-sentence opinion as an expert medical opinion. Dr. F's letterhead and signature do not suggest that he is a neurological or other specialist, or that he has any particular expertise beyond that of a general physician. Dr. F does not provide a diagnosis or a prognosis, and he does not state whether he has reviewed the Claimant's chart or any other medical records before offering his opinion. Dr. F does not say how long he has been treating the Claimant or if he had ever seen him before he provided the note.

[52] I accept the Claimant's undisputed evidence that he was seen by Dr. F in BC, after he had moved back to BC at the end of 2017. I also accept the Claimant's statement to the Commission that Dr. F, the BC doctor that prepared the medical note, was not the Claimant's family doctor. Therefore, I find that Dr. F was not involved in the Claimant's care in 2017 and that he had no first-hand knowledge of the onset or progression of the Claimant's condition in 2017.

[53] I appreciate that there is no other medical evidence on file, but Dr. F's note is an opinion without foundation and I can give it very little weight. It has evidentiary value only insofar as it suggests that the Claimant told his doctor he was unable to work as early as January 5, 2017.

[54] The doctor's note is hearsay and directly contradicted by the Claimant as to the date of his disability. The Claimant has disputed that he told the doctor that he was unable to work due to any medical condition. In his November 1, 2018, statement, the Claimant said that the doctor did not know his condition at the time and just presumed he wasn't capable at "the time" (written in his letter). He testified that Dr. F had asked the Claimant for the date he last worked and then wrote that date into his medical note.

[55] According to the Claimant's November 1, 2018, statement, he was physically capable of some sort of employment from January 5, 2017, and until August 2017. If his statement is understood to be organized by the order in which events occurred, then the written statement

maintains that the Claimant was capable of his regular employment until his seizure, after which he remained capable of alternate employment in the oilfield industry, such as a dispatcher or other office job. As noted earlier, this interpretation is consistent with his oral testimony at the General Division.

[56] The Claimant's testimony directly contradicted the doctor's note as to what he told the doctor about the date he was first unable to work. That testimony is consistent with his statement to the Commission before he saw Dr. F. In addition, the doctor's note was hearsay. The Claimant's testimony was open to challenge by the member in a way that the doctor's note was not. Therefore, I prefer the Claimant's testimony that he only told the doctor that he last worked on January 5, 2017, but that he did not tell the doctor that he had been physically incapable of work as of January 5, 2017.

[57] Both the Commission, and the General Division on appeal, considered it significant that the Claimant had successfully applied for CPP disability benefits and that he was approved for benefits from January 2017. In his final conversation with the Commission on December 11, 2018, the Claimant confirmed that CPP reconsidered his application and approved his benefit, and that, according to CPP, the Claimant's disability commenced on January 2017. The Claimant testified that he did not apply for CPP benefits until 2018, and that he applied because his doctor in BC had told him that he should.

[58] Based on what the Claimant told the Commission, I accept that CPP determined that the Claimant was disabled as of January 2017. However, that CPP decision, made for the purpose of adjudicating a CPP disability pension benefit, is in no way binding on me. Even if I was obliged to decide this matter in such a manner as to harmonize with the Claimant's entitlement to CPP benefits, the test for CPP disability is different from the EI requirement that the Claimant be "capable".

[59] CPP requires an applicant to show that he or she has a severe and prolonged disability. A severe disability is one which regularly stops the claimant from doing any type of substantially gainful work. According to the Federal Court of Appeal in *Villani v. Canada (Attorney*

General)[22], real world details such as the applicant's education, employment experience and activities of everyday life are relevant when deciding if a disability is severe for CPP pension purposes.

[60] The bare fact that a CPP determination was made that the Claimant was disabled from January 5, 2017, is of interest, but it is not compelling. The General Division did not have access to copies of the evidence that was considered by CPP in its original decision or in its reconsideration, or even a copy of the CPP decision itself.

[61] Supposing the Claimant to have been regularly disabled from any type of substantially gainful work as was apparently determined by CPP, it may still have been possible that he remained periodically or perhaps unpredictably capable of periods of work. In other words, he may have been capable of "suitable" employment for the purposes of the EI Act, but not of "substantially gainful" employment for CPP's purposes.

[62] I have already reviewed the Claimant's relevant testimony. His testimony is the only evidence available of the nature of his physical condition and of how it actually affected his work performance. He testified that the condition that was eventually diagnosed as ataxia gave him an unbalanced gait, but that it had nothing to do with his ability to do his work. He insisted that he had been able to operate equipment and that he had continued to expect and seek a recall to work at his regular employer throughout his claim.

[63] There is also some question as to the reliability of the evidence supporting the Commission's decision, given the lapse of time. According to the employer's recollection 17 months after it issued the May 2017 ROE, the ROE was issued based on the Claimant having some kind of addiction problem[23] but this was not substantiated. The Commission has neither challenged nor investigated the employer's assertion and it does not appear to have been given much weight or to have factored into any decision.

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[22] *Villani v. Canada (Attorney General)*, 2001 FCA 248.
[23] GD3-15

[64] Dr. F's letter is also based on past events. He saw the Claimant in August 2018, about 20 months after the Claimant last worked. All that we know about the foundation for his opinion is that he was told by the Claimant that he stopped work on January 5, 2017.

[65] CPP issued a decision almost two years after the onset of disability for its own purposes. This followed a request for CPP benefits filed at some point in 2018, which would have been a year or more after the Claimant stopped working. The Claimant explained that CPP had rejected his application originally because it did not then have the CT and MRI scan results[24] (that were only available at some point in 2018). According to the Claimant, before CPP's reconsideration, CPP had asked the Claimant for his last date of work, which it then used to backdate the disability benefit almost two years.

[66] The Commission's own decision is based on an investigation beginning in September 2018 of events from January to August 2017. I accept that it is possible to conduct a retrospective investigation and still generate a sound decision, but the investigation in this case produced little evidence to counter the Claimant's insistence that he was physically capable of employment during the period of his claim.

[67] I have reviewed the audio tape of the Claimant's testimony at the General Division in full. I find him to be credible. His testimony was internally consistent and consistent with his other statements to the Commission (except that he was not asked to clarify his November 1 statement). His conviction that he was always capable of working and expected to return was unwavering, and he seemed to answer the member's questions directly and to the best of his ability. Furthermore, Dr. F's medical note is so brief as to appear rushed and the Claimant's explanation that Dr. F simply asked him when he stopped work and put that into his brief note is perfectly plausible.

[68] The General Division did not refer to the Claimant's testimony but I give it significant weight. I find that he stopped working in January 2017 because a particular job had completed and because there was no new job with his employer at that time. I accept that he considered himself capable of employment as an equipment operator until August 2017 and that he was

[24] Audio recording of General Division hearing at timestamp 00:04:50

capable of some sort of employment during the period in which he collected regular benefits from January 5, 2017, to August 2017.

Was the Claimant capable of his regular employment?

[69] This question is only relevant because I accept that the *Macdonald* decision means that a claimant with a realistic expectation of recall to his regular employer should not have to establish the same kind or intensity of job search as a claimant who has no such expectation and who needs to look elsewhere for employment.

[70] However, a claimant would still need to be physically capable of that particular employment in order for his expectation of recall to be realistic. The Claimant testified that his ataxia offered no obstacle to operating equipment, but he also said that he had to walk through the mud to get to his machine, and that he believed this could be a safety factor.[25]

[71] Just before he mentioned the safety concern with his ataxia, the Claimant testified that he believed he was totally capable "to this date" (of the hearing) of operating a machine but that he couldn't work if he had to walk with a stick or a walker. He had earlier testified that he only started to use a walker in December 2018, which is almost two years after he stopped working, and about 15-16 months after his claim concluded. I therefore accept that his ataxia was not of such a degree that it impaired his ability to do his regular job of equipment operation during the period of his claim.

Faucher analysis

Did the Claimant have a desire to return to the labour market as soon as suitable employment is offered?

[72] The Claimant did have a desire to return to the labour market as soon as possible. I accept that at all relevant times through to the exhaustion of claim benefits in August 2017, the Claimant desired to return to his regular employer as an equipment operator. He indicated that he was waiting for the next job to start up, that he stayed in X where his employer was located, before moving home to BC in December 2017, the end of had kept in touch with his employer.

[25] Audio recording of General Division hearing at timestamp 00:13:30

He said that he didn't even have an ROE until he discovered it on the employer's posting board in May 2017, and even then he didn't think anything of it. He said it was just the way the employer operates. If work was slow, employees may as well be on employment insurance so the employer would issue them an ROE. The Claimant was already on a claim so he didn't pay much attention to it.

Did the Claimant express his desire to return to the labour market as soon as suitable employment is offered through efforts to find a suitable job?

[73] I accept that the Claimant had a realistic expectation of being called back in to work with his regular employer until May 3, 2017, the date of his ROE. I also accept that the Claimant engaged in some kind of search for alternate work in the oilfield industry beginning some time after he obtained the ROE.

[74] In the circumstances, I find that it was reasonable for the Claimant to have waited to be recalled to work at his regular employer prior to the date that he obtained his ROE, without having to conduct additional job search for alternate employment. He had been employed for several years with the same employer and he stated that periodic lulls between contracts or jobs was customary. He also said that it was normal to get a phone call from the employer and have to return to work with little notice. In my view, the Claimant had a realistic expectation of recall and it would be unreasonable for the Claimant to be required to search for, or to accept, some alternate job that he might have to soon quit or quit with minimal notice, when recalled to work at his regular employer.

[75] However, the Claimant did not say when he obtained the ROE from his employer's posting board. While I recognize that the Claimant may not have obtained his ROE immediately after it was issued, the only evidence on this point is the date of the ROE. This is the earliest date that the Claimant could have picked it up. Assuming the Claimant was "all about work" as he testified, he was presumably checking in with his employer regularly and would have picked it up not long after it was issued. Relying on the only evidence I have, which is that the ROE is dated May 3, 2017, I find that the Claimant obtained the ROE on May 3, 2017.

[76] The ROE indicates that the Claimant left his job due to “illness or injury”. The Claimant did not discuss the effect of the ROE with his employer. He simply assumed that the issuance of the ROE was a routine matter that did not affect his recall.

[77] However, the ROE expresses the employer’s understanding of the Claimant’s availability to return to work. Regardless of whether “illness or injury” accurately reflected the Claimant’s physical status or his ability to return to work at the time, it is highly unlikely that an employer will take the initiative to recall a claimant who leaves, takes leave, or is released from his employment for “injury or illness”, as indicated in the Claimant’s ROE.

[78] I find that, at a minimum, the Claimant would need to clarify his health status and his ability to work with his employer and ensure that nothing had changed in his employer’s intention to recall him as work became available. The Claimant failed to discuss the ROE with his employer or confirm his employment status, while also failing to take or detail any steps to locate alternate employment. This means that, after he obtained the ROE, which I have found to be May 3, 2017, the Claimant’s expectation of recall would not establish the sufficiency of his job search activities.

[79] The Claimant provided very little detail to substantiate the extent of his alternate job search activities after May 3, 2017. I find that he has not proven that he “expressed his desire to return to the labour market as soon as suitable employment is offered through efforts to find a suitable job” after May 3, 2017.

[80] **Did the Claimant set personal conditions that might unduly limit the chances of returning to the labour market?**

[81] The Claimant did not set personal conditions that unduly limited his chances of a return to work. He reasonably expected to return to the work for which he had been trained and was experienced, and working for the employer with whom he had been working for several years. After a stroke in August, he apparently began to seek work at a job that was not so stressful or high-paced, which may well have been appropriate.

[82] I have considered all three *Faucher* factors, each of which supports the Claimant’s availability for work under section 18(1)(a) of the EI Act over at least a portion of the period

since January 3, 2017. However, I give particular weight to the second factor in finding that the Claimant was not capable and available for work after May 3, 2017.

CONCLUSION

[83] The appeal is allowed in part. The Claimant was capable and available for work from January 3, 2017, to May 3, 2017, and is entitled to regular benefits in that period.

[84] The Commission may wish to consider whether the Claimant is also entitled to sickness benefits for any period after May 3, 2017.

Stephen Bergen
Member, Appeal Division

HEARD ON:	July 16, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. L., Appellant