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

Citation: *A. N. v Canada Employment Insurance Commission*, 2019 SST 908

Tribunal File Number: AD-19-374

BETWEEN:

A. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: August 26, 2019

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, A. N. (Claimant) has a long history of dental-medical problems involving her dental implants and related facial infection. The Claimant experienced complications and a resurgence of symptoms in July 2018, at a time when she was receiving Employment Insurance benefits. The Claimant had originally been treated in her home country (Country A) for the same condition so she returned to Country A for treatment.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant was disentitled to benefits from July 5, 2018, to August 17, 2018, during the period she was out of Canada because she had failed to prove that her medical treatment was not readily or immediately available in the area of her residence in Canada. It also found that she was not capable of and available for work from May 13, 2018, through to August 18, 2018, because she had claimed sickness benefits but had not provided an acceptable medical certificate. It maintained these decisions on reconsideration.

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

[5] The appeal is allowed. The General Division failed to consider evidence that would be relevant to its finding that the Claimant's medical treatment was readily or immediately available in the area of her residence in Canada. It also failed to make a necessary finding of fact on the question of whether the Claimant was available for work between May 13, 2018, and July 4, 2018.

[6] I have made the decision the General Division should have made. The Claimant is not disentitled to benefits from May 13, 2018, to July 4, 2018, because I find that she was capable of and available for work during that period. She is not disentitled to benefits from July 5, 2018, to

August 18, 2018, because she was outside of Canada for medical treatment that was not immediately available in the area of her residence in Canada.

ISSUE

[7] Did the General Division find that the Claimant's medical treatment was not readily or immediately available, in a perverse or capricious manner or without regard for the evidence before it?

[8] Did the General Division err in law by failing to make a required finding as to whether the Claimant was available for work between May 2018 and the date that she left for Country A?

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 s.58(1) of *the Department of Employment and Social Development Act* (DESD Act).

[10] The only grounds of appeal are as follows:

> The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
> The General Division erred in law in making its decision, whether or not the error appears on the face of the record, or;
> 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.

Did the General Division find that the Claimant's medical treatment was not readily or immediately available, in a perverse or capricious manner or without regard for the evidence before it?

[11] Section 37(b) of the *Employment Insurance Act* (EI Act) states that a claimant is not entitled to benefits for any period in which the claimant is outside of Canada. However, section 55(1)(a) of the *Employment Insurance Regulations* (Regulations) allows an exception when a claimant is outside of Canada for the purpose of undergoing medical treatment that is not readily or immediately available in the claimant's area of residence in Canada.

[12] The General Division found that the Claimant had not proven that her medical treatment was not readily or immediately available with reference to the "evidence on file, including the Appellant's own evidence that she could have had her treatment completed in Quebec".[1]

[13] The Claimant submitted in her application for leave that the General Division misunderstood and missed important points.

[14] The General Division had before it evidence of the history of the Claimant's medical condition. The Claimant testified that she had been to Country A in November 2017 for remedial treatment and had returned to Canada. She described her most recent treatment in 2018 as a continuation of that previous treatment.[2] She testified that she had a years-long history of treatment for the condition including several operations in Country A[3] and that her dental implants were installed as part of that treatment. She testified that her doctor in Country A had anticipated that she would have to come back for follow-up within two years, or if she developed problems.

[15] The Claimant's July 2018 treatment in County A was described in a letter from her surgeon as involving surgical scraping and removal of inflammatory tissue around her dental implants. The surgeon confirmed that her presence was required as part of her complex long-term treatment.[4]

[16] The Claimant also provided evidence related to the urgency with which she required treatment. She told the Commission that she had been sick and in pain since the beginning of May 2018,[5] but she testified that a "few days" before [she left Canada] she developed an infection in her whole face, with swelling in her face, eyes and throat, difficulties in speech and difficulty sleeping.[6] The Claimant testified that she called her [original] doctor in Country A and he said that she had to come right away.[7] In her written statement she said that her doctor told her

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[1] General Division decision, para. 16
[2] GD3-26
[3] Audio recording of General Division hearing at timestamp 5:20
[4] GD3-21
[5] GD3-46
[6] *Supra* note 3 at 12:10
[7] *Supra* note 3 at 12:20

that she could suffer serious consequences if she did not address the situation.[8] The Claimant left for Country A the next day.[9]

[17] The Claimant's evidence included a review of her experience with seeking treatment in Canada. In a written statement, the Claimant asserted that she had not been well since April-May 2017 and that she had seen emergency doctors in both Hull (Gatineau) and Montreal.[10] She said that she had also seen a doctor in November [2017] who took x-rays[11] and that she had seen another doctor in Montreal but that he had told her he, "couldn't even open it".[12] She was told it would be months before any operation could be arranged, and she said it would require her "history" which was still [in Country A].[13] English is not the Claimant's first language and her English vocabulary is somewhat limited so I asked her at the Appeal Division to explain what she had meant when she said that the doctor couldn't "open it". She clarified that the doctor did not have the instruments to remove her dental implant.

[18] The Claimant also testified that her problem was not just dental but involved problems with her facial bones, including the area around her eyes and her sinuses. She said that, in Canada, she would have to obtain treatment in different places for different aspects of dental and medical care. In both her written statement and her testimony, she asserted that she could obtain care more quickly in Country A because it was "centralized"—by which the Claimant meant integrated treatment that involved both dental treatment and other medical treatment including surgery on the facial bones.[14] The Claimant's dentist in Montreal had recommended that the Claimant be treated by the specialist that performed the work originally,[15] which he later confirmed in writing.[16]

[19] At the General Division, the Claimant related an attempt that she had made to obtain treatment on another occasion years earlier. She had seen a doctor for complications from her

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[8] GD3-26
[9] *Supra* note 3 at 12:15
[10] GD3-26
[11] *Supra* note 3 at 24:30
[12] *Supra* note 3 at 25:00
[13] *Supra* note 3 at 24:10
[14] *Supra* note 3 at 23:30
[15] GD3-46
[16] GD3-49

dental implant but had been very upset because the doctor removed a part of her dental implant that was "moving", even though its removal affected her ability to speak. She said that the doctor explained that he did this because she could not afford other care (presumably care involving a more comprehensive solution to her problems).[17]

[20] The General Division was evidently aware of that part of the Claimant's justification that described treatment in her home country as cheaper, centralized, and employing specialized instruments.[18] The General Division dismissed these considerations on the basis that section 55(1)(a) of the Regulations does not contemplate the need for cost-effective or expedient treatment.[19]

[21] However, the circumstances described by the Claimant involved more than cost and expedience. The Claimant described the specialized and ongoing nature of her treatment, the difficulty and delay in arranging multi-disciplinary treatment in Canada, the delay that would be involved in obtaining her records from Country A, and her previous experience seeking treatment in Canada where the required tools and techniques of her treatment were apparently unknown to the treating doctor. More importantly, she explained that her condition had progressed to where treatment was urgently required. She had been to see doctors in Canada but discovered that treatment would take months to arrange and would require the transfer of her medical records from Country A. Conversely, her specialist in Country A would see her immediately.

[22] These circumstances were relevant to the General Division's determination of whether alternative treatment was readily or immediately available in the Claimant's area. The General Division chose to rely on what it described as the Claimant's "own evidence" that she could have had her treatment completed in Quebec. In her Appeal Division hearing, the Claimant said that the General Division must have misunderstood her: She said that she could get treatment in Canada to relieve the pain.

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[17] *Supra* note 3 at 26:30
[18] General Division, para. 15
[19] General Division, para. 16

[23] I have not found where the Claimant told the General Division that she could have accessed in Quebec the kind of treatment she received in Country A. The Claimant testified that had seen a doctor in 2017 who was unable to work on her dental implants and who said that it would take months to coordinate her treatment. However, this was before her November 2017 treatment in Country A, and not during the onset of acute symptoms in July 2018. The Claimant's evidence was that she could not access appropriate treatment in Canada on an urgent basis.

[24] In any event, evidence of the availability of treatment based on consultations in Montreal in mid-2017 is only responsive to the question of whether the treatment was available at all in Canada. It does not speak to whether the medical treatment was **readily** or **immediately** available. The General Division did not consider whether treatment was immediately available to address the state of the Claimant's condition in July 2018.

[25] Nor does the General Division address whether treatment was available to the Claimant in the Claimant's **area of residence**. According to her statement, she was at a clinic in Gatineau when she "discovered" by chance that she still had a family doctor in Montreal.[20] However, she lived in Ottawa since 2017[21] at the time that she was seeking treatment in May 2018 and afterwards. Presumably, her area of residence would be the Ottawa area.

[26] I find that the General Division ignored important evidence that was relevant to the question of whether the Claimant's treatment was immediately available.

[27] The Commission agreed with the leave to appeal decision that there is an arguable case that the General Division failed to consider some evidence on whether the treatment was readily or immediately available. It is not clear from that submission whether the Commission is conceding the point that the General Division erred by failing to consider relevant evidence.

[28] I accept that the General Division's finding that the Claimant's treatment was readily or immediately available in Canada was made in a perverse or capricious manner or without regard to the material before it under section 58(1)(c) of the DESD Act.

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[20] GD3-26
[21] GD3-27

Did the General Division err in law by failing to make a required finding as to whether the Claimant was available for work between May 2018 and the date that she left for Country A?

[29] The Claimant originally applied for regular benefits, not sickness benefits. Her claim was converted to sickness benefits on or about June 29, 2018, after the Commission had determined that availability was an issue.[22] The Commission only informed the Claimant that she was disentitled to benefits in October. The decision letter said that she was disentitled to benefits from May 13, 2018, through to August 18, 2018, for two reasons. It stated that it had "learned that she was not capable to work" which meant that the Claimant did not meet the requirements of section 18(1)(a) of the EI Act. It also stated that her medical certificate was not acceptable, suggesting that she did not meet the requirements of section 18(1)(b) of the EI Act.

[30] The General Division found that the Claimant had not proven that she was incapable of work because of illness because it did not accept that her medical evidence did not state the duration of her illness or that she was unable to work. This finding upholds the Claimant's disentitlement to benefits under section 18(1)(b) of the EI Act during the time that she was in Canada, but it undermines the Commission decision that the Claimant should be disentitled to benefits due to her incapacity in the period before her departure to Country A for treatment.

[31] However, the General Division dismissed the Claimant's appeal in its entirety. That means that the General Division upheld the Commission's conclusion that the Claimant was disentitled in the period from May 2018 until she left for Country A in July 2018. Having found that the Claimant was capable during that time, General Division's decision would require a finding that the Claimant was not available for work within the meaning of section 18(1)(a) of the EI Act.

[32] The General Division analyzed the Claimant's availability, but only during the time that she was in Country A. It found that she demonstrated a desire to return to the labour market as soon as possible and that she made efforts to find suitable employment. However, it found that she had set personal conditions that limited her chances of returning to the labour market *during the time that she was in Country A.* Clearly, this personal condition did not apply during the time

[22] GD3-15, 16

that she was in Canada. Equally clearly, the General Division did not determine the Claimant's availability during the time that she was still in Canada.

[33] Given the General Division's finding that the Claimant was not incapable, it was necessary that the General Division also make a finding on availability before confirming that she was disentitled from May 2018 until she left Canada. It did not make such a finding.

[34] I find that the General Division erred in law under section 58(1)(b) of the DESD Act by failing to make a required finding of fact.

REMEDY

[35] 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.

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

[37] The Commission has now conceded that the Claimant has proven that she was available and capable of working in that period from May 13, 2018, to July 4, 2018, which precedes her leaving Canada for medical treatment. The Commission accepts that she was confused in requesting medical benefits and that she had always maintained, including in her testimony to the General Division, that she was capable of working and searching for suitable employment during the time that she was in Canada.

[38] I agree with this submission and find that the Claimant was not disentitled to benefits from May 13, 2018, to July 4, 2018, because she was capable of and available for work. I rely on the Claimant's testimony in which she described details of her job search and stated that she was very active in her job search after her contract ended in May 2018[23]. I also rely on her written

[23] *Supra* note 3 at 9:49

statement that she was continuing to look for work and taking exams and attending interviews,[24] and on her statement to the Commission that she would still have worked despite the pain.[25]

[39] Regarding the time that the Claimant was outside of Canada, the Commission submitted that, even if the Claimant was outside of Canada to obtain medical treatment that was not readily and immediately available in her area of residence, the Claimant would still not meet the requirements of section 55(1)(a) of the Regulations. The Commission argues that section 55(1)(a) is made subject to section 18(1) of the EI Act and that the Claimant must therefore still prove that she would otherwise be available for work under section 18(1)(b) even if she were ill. According to the Commission, she was not "otherwise available" because she was outside of Canada.

[40] In my view this view mistakes the meaning of otherwise available in section 55(1)(a) of the Regulations. Section 55(1)(a) provides an exception to the usual disentitlement under section 37 of the EI Act for a person who is outside of Canada but who is obtaining medical treatment that would not be readily and immediately available in the area of the Claimant's residence. It would be perverse for the Regulations EI Act to have a grant a specific exception to the section 37 disentitlement for being outside Canada, but then to interpret the requirement that the Claimant be "otherwise available" in section 18(1)(b) to mean that the claimant will always be disentitled regardless of section 55(1)(a) - because he is outside Canada. Under this view, there could be no circumstance in which the exception in section 55(1)(a) could operate and it would have no purpose. The "otherwise available" in section 18(1)(b) plainly means "if not for the illness or disease". In my view, the illness or disease must include treatment for the illness or disease, whether that treatment takes place inside or outside of Canada.

[41] I accept that the Claimant's situation was urgent. The onset of the Claimant's symptoms was fairly rapid and apparently debilitating. The Claimant was concerned and she accepted the advice of her specialist in Country A that there could be serious consequences for delaying her treatment. The condition for which the Claimant needed treatment was a consequence of, or represented a setback, in a continuing course of treatment begun in Country A that had already

[24] GD10-2
[25] GD3-46

spanned years. The Claimant's doctor in Country A was willing to see her immediately and he also was uniquely qualified, by his personal experience with the Claimant and her treatment, to address her problems in the most effective manner.

[42] I also accept that there would be delays inherent in obtaining records from Country A and in obtaining referrals, arranging appointments, and accessing treatment in the Ottawa area. I accept that the type of treatment she had received or the nature of her implants was likely less common in Canada than in Country A and that this may have exacerbated the difficulty in obtaining effective treatment immediately.

[43] Since I have found that the Claimant urgently required medical treatment in July 2018, it is my view that her treatment may only be considered "immediately available" in the particular circumstances of this case, if it is available on an urgent basis. According to the Claimant's surgeon in Country A, she was treated for peri-implantitis, which is defined as an infection in the soft and hard tissues (bone) around an implant. The Claimant said that she had been taking pain medication and following the instructions of doctors to eliminate the infection but that it had gotten suddenly worse.[26] I am satisfied from the medical report prepared by the Claimant's doctor in Country A, and from his advice to the Claimant that the removal of inflammatory infiltrate and curettage procedure was medically necessary to address the root of her problems. The Claimant may have been able to obtain pain medication and antibiotics, or even have her implants removed on an urgent basis. However, I am satisfied that the procedure that she received in Country A to address her complications, while also maintaining the implants that support her bridge,[27] was not immediately available in the area of her residence in Canada.

[44] Therefore, I find that the Claimant's treatment in Country A was not immediately available in Canada and that section 55(1)(a) of the Regulations applies to exempt her from the disentitlement under section 37 of the EI Act for being outside of Canada.

[45] The Claimant was in Country A from July 5, 2018, until August 18, 2018. The letter from her specialist in Country A confirms that her presence was necessary for complex long-term treatment and that she was under medical supervision the entire time. There is no evidence to the

[26] GD3-43
[27] GD3-49

contrary. Therefore, I find that the Claimant was unable to work from July 5, 2018, until August 18, 2018, because of her treatment which is a consequence of her particular illness or injury. She is not disentitled to benefits under section 18(1)(b) of the EI Act.

CONCLUSION

[46] The appeal is allowed. I have made the decision the General Division should have made. The Claimant is not disentitled to benefits from May 13, 2018, to July 4, 2018, because I have found that she was capable of and available for work during that period. She is not disentitled to benefits between July 5, 2018, and August 18, 2018, after she returned to Canada because I accept that she was unable to work due to illness or injury and obtaining treatment outside of Canada that was not readily and immediately available in the Claimant's area of residence.

Stephen Bergen
Member, Appeal Division

HEARD ON:	August 13, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	A. N., Appellant