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

Citation: *B. D. v Canada Employment Insurance Commission*, 2019 SST 1396

Tribunal File Number: AD-18-619

BETWEEN:

B. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: December 9, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed in part.

OVERVIEW

[2] The Appellant, B. D. (Claimant), is appealing the General Division's decision. The General Division concluded that the Claimant was disentitled from receiving Employment Insurance sickness benefits. This was because it found that he was not otherwise available for work after February 11, 2018.

[3] The Claimant argues that the General Division made legal and factual errors. The Claimant is asking for sickness benefits from February 11, 2018 to July 16, 2018. Alternatively, he is asking for sickness benefits from May 21, 2018, when he fractured his wrist. He claims that he was injured and unable to work and that he was otherwise available for work throughout both periods.

[4] I find that the General Division overlooked some of the evidence. By overlooking some of the evidence, it failed to consider whether the disentitlement to benefits ended before the Claimant returned to work on July 16, 2018. The evidence shows that by no later than April 30, 2018, the Claimant received a job offer. He was unable to work because of a prescribed illness when he would have otherwise been available for work. I find that the disentitlement ended on April 30, 2018.

BACKGROUND FACTS

[5] The Claimant, a truck driver, worked for the same company for many years. He worked from spring to November each year. For approximately eight years, the Claimant did not work at all between "December/November and May."[1] He explained that he did not work during two of those years because he was on parental benefits.[2]

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[1] See Supplementary Record of Claim, dated January 19, 2018, at GD3-26.
[2] See Supplementary Record of Claim, dated January 31, 2018, at GD3-40.

[6] In 2017, the Claimant started working on June 26 and last worked on November 3, 2017, when there was a shortage of work. Shortly after, the Claimant applied for Employment Insurance regular benefits.

Claim for regular benefits

[7] The Respondent, Canada Employment Insurance Commission (Commission), turned down the Claimant's application for regular benefits. It determined that he was not available for work. It imposed an indefinite disentitlement on the Claimant, as of December 25, 2017. It meant he would not be entitled to receive regular benefits for an indefinite period.

[8] The Claimant asked the Commission to reconsider its decision, on the basis that he had been looking for work.[3] However, the Commission did not change its mind. It still found that he had not proven that he was available for work.[4]

[9] The Claimant did not immediately appeal the Commission's reconsideration decision to the Social Security Tribunal—General Division. By the time the Claimant appealed, more than one year had passed since the reconsideration decision had been made. He was out of time to appeal.[5] The disentitlement that started on December 25, 2017, remained.

Claim for sickness benefits

[10] On February 8, 2018, the Claimant applied to have his Employment Insurance claim converted from regular to sickness benefits. His family physician wrote a medical note dated February 8, 2018. The doctor was of the opinion that the Claimant was unable to work. His neck and back arthritis were worse because of the severe cold. The doctor expected the Claimant would need a few months to get better.[6]

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[3] See Claimant's request for reconsideration, dated January 2, 2018, with Job Search Form, at GD3-22 and GD3-GD3-25.
[4] See Supplementary Record of Claim, dated January 31, 2018, at GD3-40.
[5] See Claimant's letter dated September 6, 2019, at AD7-2.
[6] See family physician's note, dated February 8, 2018, at GD3-44.

[11] The Commission turned down the Claimant's claim for sickness benefits. It turned him down because he did not prove "that [he] would be available for work if [he was] not sick. In [his] case, [he had] failed to prove that [he] would be otherwise available."[7]

[12] The Claimant asked the Commission to reconsider its decision, on the basis that his neck and back pain were getting worse. He also needed more investigations into his medical condition. He provided a printout of prescriptions he had filled since February 8, 2018. He also provided a copy of an MRI of his cervical, thoracic and lumbar spine. The scan showed that he had degenerative disc disease in his cervical spine.[8]

[13] The Commission maintained its position. It found that the Claimant still had not proven that he was otherwise available for work.[9]

Appeals to the General Division and to the Appeal Division

[14] This time, the Claimant appealed the Commission's reconsideration decision to the General Division.[10] He was appealing because he continued to have severe neck and back pain. The General Division dismissed his appeal.

[15] The Claimant requested leave to appeal the General Division's decision. This was the first step of the appeals process. It meant that he had to get permission from the Appeal Division before he could move on the second and final stage of the appeal process.

[16] The Appeal Division found that there was an arguable case that the General Division erred in law or made an error of mixed fact and law by concluding that were it not for the illness, the Claimant would not have been available for work. The Appeal Division granted leave to appeal, so the Claimant could move on to the next stage of the appeal process.

ISSUES

[17] The issues before me are as follows:

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[7] See Commission's letter dated March 13, 2018, at GD3-46.
[8] See list of prescriptions, at GD3-48, and scan taken on March 8, 2018, at GD3-49.
[9] See Commission's reconsideration decision dated April 19, 2018, at GD3-52 to GD3-53.
[10] See Notice of Appeal filed with the General Division on May 14, 2018, at GD2.

(a) Did the General Division apply the wrong legal test for Employment Insurance sickness benefits?

(b) Did the General Division overlook key pieces of evidence?

ANALYSIS

[18] The General Division found that the Claimant was disentitled from receiving Employment Insurance sickness benefits. The Claimant argues that the General Division essentially applied the wrong legal test. He argues that the General Division used the legal test for regular benefits instead of the legal test for sickness benefits. In particular, the Claimant argues that the General Division considered whether he was "available for work" under paragraph 18(1)(a) of the *Employment Insurance Act*. He argues that it should have considered whether he "would otherwise be available for work" under paragraph 18(1)(b).

[19] Further, the Claimant submits that the General Division erred by relying on evidence from his claim for regular benefits. He says that it should have examined whether he was available for work when he requested sickness benefits.

[20] The Claimant asserts that he should receive sickness benefits from February 11, 2018 to July 16, 2018. This is so he claims because he was unable to work because of a prescribed illness and would have otherwise been available for work.

[21] As an alternative, the Claimant asserts that he should receive benefits from May 21, 2018 to July 16, 2018. He fractured his arm on May 21, 2018. He claims that this extra medical information proves without any doubt that he could not work because of injury.

[22] The Commission notes that when the Claimant requested sickness benefits in February 2018, there was an existing disentitlement that applied. The Claimant was disentitled to benefits because he had failed to prove that he was available for work from November 3, 2017 to February 8, 2018. November 3, 2017 was when he last worked. February 8, 2018 was when he requested sickness benefits.

[23] The Commission argues that because of the disentitlement, the Claimant was unable to prove that he would otherwise be available for work if not for his illness. The Commission

argues that, as such, the Claimant was disentitled to receive sickness benefits under paragraph 18(1)(b) of the *Employment Insurance Act.*

February 11, 2018 to May 21, 2018

(a) Whether the General Division applied the wrong legal test for Employment Insurance sickness benefits

[24] Subsection 18(1) of the *Employment Insurance Act* states:

> 18.(1) Availability for work, etc.—a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that the day the claimant was
>
> (a) Capable of and available for work and unable to obtain suitable employment;
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> (b) Unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; and
>
> (c) Engaged in jury service.

[25] Under subsection 18(1), there are two requirements for sickness benefits: (1) a claimant must be unable to work because of a prescribed illness, injury, or quarantine, and (2) a claimant must otherwise be available for work if not for his illness, injury, or quarantine.

[26] It is not enough for the Claimant to show that he was unable to work because of illness or injury. He must also show that he was otherwise available for work, but for his injury.

[27] The General Division considered whether the Claimant was available for work by determining whether he met the three "*Faucher*" factors. In *Faucher v. Canada (Employment and Immigration Commission),*[11] the Federal Court of Appeal said that availability must be determined by analyzing three factors:

1. The desire to return to the labour market as soon as a suitable job is offered,

[11] See *Faucher v Canada (Employment and Immigration Commission*), 1997 CanLII 4856 (FCA).

2. The expression of that desire through efforts to find a suitable job, and

3. Not setting personal conditions that might unduly limit the chances of returning to the labour market.

[28] The Claimant argues that the test for availability under paragraph 18(1)(b) of the *Employment Insurance Act* is different from the test for availability under paragraph 18(1)(a). Although the Claimant argues that there is a different test, he agrees that he had to meet the *Faucher* factors to show availability. But, if the same factors apply, then the test for availability is the same.

[29] I see no legal error on the part of the General Division. It identified the proper legal test. It recognized that it had to assess whether the Claimant "would otherwise be available for work" by analyzing the three *Faucher* factors.

(b) Whether the General Division overlooked key pieces of evidence

[30] The Claimant says that the General Division should not have considered whether he met the *Faucher* factors in November 2017. He says that the General Division should have considered whether he met the factors in February 2018. He says that February 2018 is the relevant date because he requested sickness benefits then. He argues that, in essence, the General Division overlooked key pieces of evidence by failing to consider whether he met the *Faucher* factors in February 2018.

[31] To prove that he was available in February 2018, the Claimant relies on the fact that he secured employment. He had applied to a demolition and excavating company in November 2017, but this company did not have any work available at the time. This company called him in April 2018 about the possibility of work in May 2018. The company called him again in May 2018 when there was work available.

[32] The General Division addressed these arguments. The General Division acknowledged that the Claimant asked the demolition and excavating company if there was any work available.

[33] Even so, the General Division found that the Claimant had provided "verifiable evidence of only one (1) job application. And, this job application dated back to November 2017—"some three (3) months prior to his claim for sickness benefits."[12]

[34] The General Division did in fact examine the Claimant's job search efforts leading up to his request for sickness benefits. It found that there was only job application that it could verify. However, it is clear that the General Division considered the job application to be too dated to show that the Claimant had been actively looking for work. And, because there was only one verifiable job application, the General Division found that the Claimant's job search effort also was not serious, continual, and intensive. It concluded that the Claimant did not meet the second *Faucher* factor. He had not demonstrated a desire to return to work leading up to February 2018.

[35] The General Division also considered whether the Claimant avoided setting personal conditions that might have limited his chances of returning to the labour market. The General Division found that there was conflicting evidence from the Claimant on this issue.

[36] On the one hand, the Claimant suggested that he was interested in only seasonal work. On the other hand, the Claimant testified that he looked for work every day.

[37] The General Division preferred the earlier evidence because the Claimant gave it spontaneously. Plus, the Claimant's work history showed that he worked on a seasonal basis. Typically, he returned to work in the spring. From this, the General Division concluded that the Claimant restricted himself to seasonal work.

[38] Because it found that the Claimant restricted himself to seasonal work, the General Division concluded that the Claimant set personal conditions that unduly limited his chances of returning to the labour market. For this reason, the General Division found that the Claimant did not meet the third *Faucher* factor.

[39] Despite the fact that there was an indefinite disentitlement, I find that the General Division did in fact examine whether the Claimant was available for work when he applied for

[12] See General Division decision at para. 40.

sickness benefits in February 2018. As such, I do not see that the General Division overlooked key pieces of evidence.

May 21, 2018 to July 16, 2018

(a) New evidence

[40] The Claimant says that he fractured his arm on May 21, 2018.[13] He produced medical records to support his claim that he has had ongoing medical issues since February 2018.[14]

[41] Generally, the Appeal Division does not accept new evidence. In this case, I see that the Claimant testified at the General Division hearing that he fell and broke his arm on May 21, 2018. He went to the hospital. Doctors put his arm in a cast. The Claimant had an operation during which rods were inserted. On July 9, 2018, doctors removed the cast and told him that he could not work until August 20, 2018.[15] (Driven by financial strain, the Claimant returned to work more than a month early in July 2018. He did wait until he fully recovered.)

[42] The Claimant's medical condition after February 2018 is not an issue. The medical records supplement the Claimant's oral testimony. The medical records give some general background and understanding of the Claimant's medical issues.

[43] The medical records confirm the Claimant's testimony that he slipped and fell and fractured his left wrist. The records show that he went to the emergency department. The records also show that he had surgery on his left wrist. The fracture healed. The specialist was of the opinion that the Claimant's range of motion and strength were satisfactory. The Claimant however continued to have pain in his wrist even after several months. He had an MRI in January 2019 to rule out a tear. The medical records were current to January 2019.

[44] The Commission already accepted that the Claimant was unable to work because of a prescribed illness or injury. It wrote that "his incapacity was proven."[16] The only contentious

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[13] The medical note dated May 22, 2018 says that the Claimant feel two days ago, so likely the Claimant fractured his arm on May 20, 2018.
[14] See medical records from the Claimant's family physician, at AD5.
[15] At approximately 45:25 to 48:07 of the audio recording of the General Division hearing.
[16] See Supplementary Record of Claim, dated April 19, 2018, at GD3-50 to GD3-51.

issue before the General Division was whether the Claimant was "otherwise available for work," other than for his illness or injury. Largely because the Claimant's medical condition is not an issue, I see no reason why I should not consider these records.

[45] This leaves me to determine whether the General Division applied the correct legal test when it looked at whether the Claimant was "otherwise available for work" from May 21, 2018 to July 16, 2018.

(b) Whether the General Division overlooked key pieces of evidence

[46] The General Division focused on whether the Claimant was "otherwise available for work" as of February 11, 2018.

[47] The Commission is of the position that an indefinite disentitlement ends once a claimant resumes working or once he receives a verifiable job offer.

[48] There was evidence before the General Division that a demolition and excavating company called the Claimant in April 2018 about the possibility of work in May 2018.[17] The Claimant further testified that this same company called him again in May 2018, because it needed drivers then.[18]

[49] The Claimant also received two other job opportunities in May 2018.[19] One was with a cleaning products company, and the other, with a shutter and blind company.

[50] In short, the Claimant claims that he would have returned to work sometime in May 2018, but for his initial back and neck problems and his subsequent wrist injury. This is consistent with the Claimant's work history. As a seasonal worker, he usually returned to work in May each year.

[51] Yet, there is no indication that the General Division examined any of this evidence to decide whether the disentitlement against the Claimant could or should have ended any time

[17] See letter from demolition and excavating company at GD6-1 and AD5-34, and at approximately 43:40 of the audio recording of the General Division hearing.
[18] At approximately 43:55 of the audio recording of the General Division hearing.
[19] See Claimant's letter dated June 4, 2018, at GD5-2.

before he returned to work on July 16, 2018. The Commission agrees that the General Division overlooked this evidence.

REMEDY

[52] Having found that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it, I have to decide how I should dispense with this matter. The Commission argues that I should give the decision that the General Division should have given. I agree that this is appropriate because I have all of the available evidence before me.

[53] The Commission acknowledges that the disentitlement against the Claimant ended once he received an initial job offer from the demolition and excavating company. The Claimant received the job offer sometime in April 2018. Once the Claimant received the job offer, the only thing that stopped him from returning to work was his ongoing back and neck pain, and the fracture to his wrist on May 21, 2018.

[54] The employer's letter does not provide an exact date in April when it called the Claimant about work. However, the Claimant testified that he told the company that he would need to check with his family doctor about when he could return to work. The Claimant testified that he went to see his family doctor in May 2018, who told him to wait "another three weeks"[20] and then he would be ready to start working. The medical records show that the Claimant saw his family physician on May 22, 2018.

[55] The Commission calculates that the Claimant must have received the job offer approximately three weeks before he saw his family physician, given the reference to "another three weeks."

[56] I do not necessarily accept that "another three weeks" indicates that the Claimant received a job offer "three weeks ago" from when he saw his doctor in May 2018. Yet, there is no other evidence to show when the employer contacted the Claimant with a job offer in April 2018.

[20] At approximately 44:19 to 44:58 of the audio recording of the General Division hearing.

[57] The Claimant saw his family physician two times in April. There is nothing in any of the April records to suggest that the Claimant discussed having a job offer. [21] Similarly, when the Claimant spoke with the Commission on April 19, 2018, there was no discussion about any job offers.[22] The medical records and the Commission's phone log notes suggest that the Claimant had yet to receive any job offers by April 19, 2018.

[58] In the absence of evidence that definitively shows when the Claimant received the job offer, I am prepared to accept that the Claimant received the job offer by no later than April 30, 2018, thus ending the disentitlement to sickness benefits.

[59] In summary, I find that as of April 30, 2018, the Claimant has proven that he was unable to work because of a prescribed illness and that he would otherwise have been able to work, but for that illness.

CONCLUSION

[60] The appeal is allowed in part.

[61] The General Division overlooked some of the evidence. By overlooking some of the evidence, it failed to consider whether the disentitlement to benefits ended before the Claimant's return to work on July 16, 2018. The evidence shows that the Claimant received a job offer on April 30, 2018. Therefore, the Claimant has proven that, on that day, he was unable to work because of a prescribed illness when he would have otherwise been available for work. The disentitlement to sickness benefits ended on April 30, 2018.

Janet Lew
Member, Appeal Division

[21] See family physician's medical records dated April 9, 2018 and April 17, 2018, at AD5-9 to AD5-11.
[22] See Supplementary Record of Claim, dated April 19, 2018, at GD3-50 to GD3-51.

HEARD ON:	November 25, 2019 and December 5, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Manpreet Bhogal (articled student) and Joshua David (counsel), Representatives for the Appellant Josee Lachance, Representative for the Respondent