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

Citation: *J. M. v Canada Employment Insurance Commission*, 2020 SST 140

Tribunal File Number: AD-19-804

BETWEEN:

J. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: February 20, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed. The General Division erred in how it applied the legal test, but I have made the decision that it should have made and I find that the Claimant was not available for work.

OVERVIEW

[2] The Appellant, J. M. (called the "Claimant" in this decision), left her employment in January 2019 because her job duties aggravated her knee pain. She applied for Employment Insurance benefits and received sickness benefits. Near the end of April 2019, the Claimant asked that her sickness benefits be converted to regular benefits. She said that she could not return to her previous employment because of medical limitations but that was looking for some kind of sit-down job.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) refused her request for regular benefits. It decided that she was not available for work because she had not done enough to find work within her medical restrictions. The Claimant asked the Commission to reconsider but it would not change its decision. The Claimant appealed to the General Division of the Social Security Tribunal where her appeal was dismissed. The Claimant is now appealing to the Appeal Division.

[4] The appeal is dismissed. The General Division misapplied the legal test for availability but I have corrected that error and the result is the same. The Claimant was not available for work within the meaning of the *Employment Insurance Act* (EI Act).

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] I may only allow the appeal if I find that the General Division made an error or errors that are related to the "grounds of appeal". These are described below:[1]

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[1] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act.*

a) The General Division hearing process was not fair in some way.

b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.

c) The General Division based its decision on an important error of fact.

d) The General Division made an error of law when making its decision.

ISSUE(S)

[6] Did the General Division make an error of law when it assessed whether the Claimant was available for work?

ANALYSIS

Legal test for availability

[7] Section 18(1) of the EI Act states that a claimant will not be considered entitled to benefits for any day that the claimant does not prove that he or she is capable of and available for work. In a case called *Faucher v Canada (Attorney General)*,the Federal Court of Appeal stated that availability should be assessed by looking at three factors[2] (the "*Faucher*" factors). The three factors are:

a) Whether the claimant desires to return to work;

b) Whether the claimant acts on that desire and actually looks for work; and

c) Whether the claimant sets personal conditions that limit his or her ability to return to work by too much.

[8] The General Division found that the Claimant had a desire to return to work but that she had restricted both her job search and the kind of work she would accept. The Claimant had only looked for work within her community because she had difficulty arranging transportation to any

[2] *Faucher v Canada (Attorney General)*,A-57-96

other community. She also restricted herself to jobs in which she could sit all day because of her knee condition.

[9] In finding that the Claimant had set personal conditions that unduly limited her chances of returning to the labour market (one of the *Faucher* factors), the General Division said this about her knee condition:

> Throughout the period the Claimant was either awaiting surgery or recovering from surgery which limited her chances of returning to the labour market.[3] (Emphasis added)

[10] The General Division did not say in what way the Claimant's surgery "limited her chances" but it acknowledged the Claimant's testimony that she had been looking for work locally where she "could be sitting all day."[4] It also acknowledged the Claimant's testimony that she could not drive for a period of time after her surgery in June.

[11] The third *Faucher* factor says that a claimant may not unduly limit his or her chances of returning to work by "setting personal conditions". The Commission argues that it does not matter whether the Claimant's restrictions were voluntary or involuntary. What matters is that they limited her chances of finding employment. I disagree. Restrictions arising from the Claimant's knee disability do not represent a "personal condition" that the Claimant placed on the kind of work she is willing to look for.

[12] The Commission cited Canadian Umpire Benefit (CUB) 5849, a decision of the former Umpire. However, CUB 5849 does not support the notion that physical restrictions should be considered personal conditions. The decision distinguishes "personal" factors such as a claimant's willingness to work from the claimant's physical capacity to work. According to the Umpire, a claimant's lack of capacity for work does not mean that a claimant is unwilling to work. Claimants should be assessed by their willingness to work *within* their capacity.

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[3] General Division decision, para. 15
[4] General Division decision, para. 8

[13] CUB decisions are not binding on the Social Security Tribunal, but I agree with the Umpire's comments below:

> [Availability] implies a willingness to work under normal conditions without unduly limiting chances of obtaining employment. Willingness to work is a personal factor and is demonstrated by the claimant's attitude and conduct...
>
> Willingness to work and the capacity of performing some kind of occupation are certainly two different things. But where a person, though incapacitated, remains able to perform some light labour, then the adjudicating officer will have to consider his willingness to work if he finds that the insured person is still employable.

[14] Another Umpire decision (CUB 16840) upheld a decision that found that a claimant had made little effort to find alternative employment that would be *suitable to him in terms of his restricted capacity*. CUB 14866B said that the Commission could have given greater latitude to a claimant whose skills *and health condition* limited his prospects.

[15] I am persuaded that a claimant who is partially incapacitated can only be expected to be available for jobs of which the claimant is capable. Under section 18(1)(a) of the EI Act, "availability" means availability for suitable employment. If the Claimant can only work at sit-down jobs because of physical limitations, then sit-down jobs are the only jobs that are suitable for the Claimant. Where *Faucher* talks about "setting personal conditions", it is addressing the situation where a claimant makes a choice that limits his or her opportunities. Claimants who have restrictions arising from physical disabilities, cannot choose to accept work outside of their restrictions. Such work is unsuitable.

[16] The General Division misinterpreted one of the *Faucher* factors and misapplied the test for availability. This is an error of law. Having found an error in the General Division decision, I will now turn to what I should do about it.

REMEDY

[17] I have the authority to change the General Division decision or to give the decision that the General Division should have given.[5] I could also send the matter back to the General Division to reconsider its decision.

[18] I will give the decision that the General Division should have given because I consider that the appeal record is complete. This means that I accept that the General Division has already considered all the issues raised by this case, and that I can make a decision based on the evidence that the General Division received.

Capability

[19] The Claimant's evidence was that she had knee problems that required knee replacement surgery[6] and that she had the surgery on June 27, 2019. The Commission had provided 15 weeks of sickness benefits up to the end of April 2019 so it was presumably satisfied that she could not work at her previous job in order to grant those benefits. I have no reason to disbelieve the Claimant's evidence about her knee problem and its surgical treatment.

[20] I find that she was capable of some form of employment before her June surgery. The Claimant left her job because of knee problems and received sickness benefits. She told the Commission that she was capable of working as of April 29, 2019, and provided a doctor's note, which confirmed that she was fit for work but unable to return to her previous employer.[7] Her old job had required her to stand all the time, [8] and she told the Commission that she could not do the same type of work under the same conditions.[9] She later said that she could not stand for lengthy periods[10] and that she was willing to do anything that would allow her to sit down.[11] There was no evidence that the Claimant was incapable of work that would not require significant standing.

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[5] My authority is set out in section 59 of the DESD Act.
[6] GD3-18
[7] GD3-17
[8] GD3-19
[9] GD3-15
[10] GD3-18
[11] GD3-19

[21] However, I find that the Claimant was not capable of work after her surgery on June 27, 2019, until September 25, 2019. The Claimant stated in a letter dated July 5, 2019, that her doctor said she could go back to work if she could sit.[12] When she spoke to a Commission agent on August 15, 2019, the Claimant said that she had not been cleared to return to work and that she was still healing. She said that she "might be able to go in for a little bit" if there was no standing, and that she could probably work part-time if she did not have to do a lot.[13] The Claimant provided few details about what her doctor actually said, and it is not clear whether her doctor's advice related to the period before her surgery or afterwards. At the time of that conversation, the Claimant could only speculate as to when she would be capable of any kind of work. I am not confident that she was certain she was capable of any kind of productive work at that time.

[22] The Claimant also said that she believed she would be sufficiently recovered to return to her regular work in "another month or so", and that she hoped to be able to return to her old employer when it started up in October.[14] The most certain evidence available is the Claimant's testimony from the September 25, 2019, General Division hearing. She testified that she could return to work at her regular duties "now" and I accept that she was capable of her full duties by the date of her hearing. In her August 15, 2019, statement to the Commission she said she was not seeing her specialist until some time in September 2019 to be "cleared" to return to work. If she was capable of her regular work by September 25, 2019, as she testified, she may well have been capable of some more restricted work before then. However, there is insufficient evidence for me to determine when exactly that might be. Therefore, I find that the Claimant was capable of work within the meaning of section 18(1)(a) of the EI Act on September 25, 2019.

Availability

[23] I will now consider the Claimant's availability during the time when she was capable of working at a job that would not require her to stand for significant periods. The Claimant insisted that it was some time after her knee surgery before she could not work at a job that required her to stand all day. The Commission has not challenged her evidence on this point and it seems

[12] GD3-38
[13] GD3-40
[14] GD3-41

plausible that she could not stand for significant periods if she had knee problems so severe as to require knee replacement surgery. I accept that, before the Claimant's surgery, she was limited to jobs that did not require her to stand for significant periods.

[24] In assessing her availability, I must return to the three *Faucher* factors. The first factor is the Claimant's desire to return to work as soon as a suitable job was offered. I have no reason to disturb the General Division's finding that the Claimant had a desire to return to work.

[25] The second factor concerns her efforts to find a suitable job. In the Claimant's case, a suitable job is one in which she would not have to stand for significant periods. The Claimant lives in a small town with limited employment opportunities. She told the General Division that her job search consisted of dropping by local businesses to see if they were hiring and had positions available at which she could remain seated. She asked if there was any sit-down work at Service Canada, an insurance office and a few other stores in her own community. She did not look into any opportunities in other nearby communities, look at online job postings, or prepare a resume.

[26] The General Division assessed the evidence of the extent of the Claimant's job search and found she had not adequately expressed her desire to return to work through her job search. I did not find that the General Division ignored or overlooked any evidence related to the Claimant's job search so I have no reason to interfere with the General Division's assessment of the evidence. I accept that the Claimant did not express her desire to return to work through an adequate job search.

[27] The third *Faucher* factor is whether the Claimant set personal conditions that limited her chances of finding work. The Claimant acknowledged that there may have been work in a nearby community. However, she said that she was unwilling to accept work outside her own community because of the commute. She said that she was medically restricted from driving after her operation. She also said that, before her operation, her husband needed their car for his own work.

[28] CUB 17065 is a decision of the Umpire, in which the Umpire affirmed, as a general principle, that the absence of transportation can be a ground for disentitlement, particularly in

remote or small areas. CUB 46313 involved a claimant who could not drive and was willing to work only within the area of her small rural community. In this decision, the Umpire considered the remoteness of the claimant's residence and the limited range of employment opportunities in the geographical area of her residence. It found that the claimant had imposed personal conditions that unduly limited her chances of returning to the labour market.

[29] As I mentioned, I am not bound by CUB decisions. However, I agree with the reasoning in the CUB decisions above. While I have no doubt that the Claimant would have had difficulty arranging transportation to work, I find that she unduly limited her chances of returning to the labour market by her unwillingness to work outside of her community. This is particularly true in light of the very limited job prospects in her own small community and because of how her physical limitations further restricted her job prospects.

[30] I have considered all three of the *Faucher* factors. Even though the Claimant would have liked to return to work, I must find that she was not available before the date of her surgery because she conducted an inadequate job search which was limited to her local community. After her surgery, I find that she was incapable of employment until September 25, 2019. Therefore, the Claimant was not available for work within the meaning of section 18(1) of the EI Act from April 29, 2019, until September 25, 2019.

[31] I appreciate that the Claimant believes she should be entitled to more than 15 weeks of sickness benefits given that her condition required a significantly longer period to be treated and for her to recover. However, I cannot help her to obtain more than 15 weeks of sickness benefits. The 15-week maximum is set out in section 12(3)(c) of the EI Act, and I am required to apply the law as it is written.

CONCLUSION

[32] The appeal is dismissed. I have corrected the General Division's error of law, but I must still reach the same conclusion. The Claimant is disentitled from regular benefits after April 29, 2019, because she was unavailable for work.

Stephen Bergen
Member, Appeal Division

HEARD ON:	January 30, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. M., Appellant M. Allen, Representative for the Respondent