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

Citation: *RS v Canada Employment Insurance Commission*, 2020 SST 903

Tribunal File Number: GE-19-3945

BETWEEN:

R. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: January 24, 2020 (videoconference) and
April 29, 2020 (on the record)

DATE OF DECISION: May 1, 2020

Canada

DECISION

[1] The appeal is dismissed.

[2] The Appellant received sickness benefits and then asked to convert her claim to regular employment insurance benefits (EI benefits). The disentitlement imposed on her claim for regular EI benefits from August 5, 2019 to September 18, 2019 is correct because she did not obtain a doctor's note certifying she was capable of working again until September 19, 2019.

OVERVIEW

[3] The Appellant was paid 15 weeks of sickness benefits between February 17, 2019 and June 8, 2019. She then asked to be paid regular employment insurance benefits (EI benefits) starting on August 5, 2019. The Commission determined that she was not eligible for regular EI benefits because she had not provided a medical certificate to support that she had recovered and to outline any restrictions she had for work. An indefinite disentitlement was therefore imposed on her claim for regular EI benefits from August 5, 2019 for failing to prove her availability for work. The Appellant asked the Commission to reconsider, and provided a medical certificate dated September 19, 2019 to certify her recovery. The Commission then accepted her availability as of September 19, 2019, and modified the disentitlement so that it was limited to the period from August 5, 2019 to September 18, 2019. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[4] The Appellant argues that she started looking for work on August 5, 2019 and, therefore, has therefore proven her availability from that date. The Commission disagrees and says that she cannot convert from sickness benefits to regular EI benefits until she provides the medical certificate requested under subsection 50(8) of the *Employment Insurance Act* (EI Act) and as prescribed in subsection 40(1) of the *Employment Insurance Regulations* (EI Regulations).

[5] For the reasons set out below, I find that the Appellant was required to provide the medical evidence requested by the Commission in order to convert her claim from sickness benefits to regular EI benefits. She did not do that until September 19, 2019. Therefore, her claim for regular EI benefits cannot start until September 19, 2019.

PRELIMINARY MATTERS

[6] The Appellant has 2 related appeals before the Tribunal: GE-19-3945 and GE-19-3947. They were joined and heard together by videoconference on January 24, 2020, but separate decisions are being rendered in each file. This is the decision in GE-19-3945.

[7] At the conclusion of the hearing on January 24, 2020, the Appellant's representative asked for an adjournment in both of her appeals to follow-up on an outstanding Access to Information (ATI) request that he believed would provide information relevant to her appeals. The Appellant's evidence and submissions were complete, but I agreed to place both appeal files in abeyance for 3 months to allow the Appellant's representative to follow-up on the outstanding ATI request. I advised I would revisit the status of the ATI request in 3 months and determine if a further adjournment was warranted.

[8] On April 16, 2020, the Appellant's representative sent an email to the Tribunal with the Appellant's "final response" to her appeals (GD16).

[9] I considered these materials on April 29, 2020 and determined that no further hearing was required in either of the Appellant's appeals. The hearing was, therefore, closed on April 29, 2020.

ISSUE

[10] Is the Appellant required to provide medical evidence to prove she was available for work as of August 5, 2019?

ANALYSIS

[11] Subsection 40(1) of the EI Regulations says that to prove entitlement to sickness benefits pursuant to paragraph 18(1)(b) of the *Employment Insurance Act* (EI Act), you must provide a medical certificate completed by a doctor attesting to your inability to work due to illness, injury or quarantine, and stating the probable duration of the illness, injury and quarantine.

[12] To subsequently make a claim regular EI benefits after being paid sickness benefits, you need to prove that your physical condition has clearly improved and you are capable of working

again. Subsection 50(8) of the EI Act gives the Commission the authority to require you to provide certain evidence about your availability for work, including medical evidence as to a claimant's capability for work.

[13] Where the Commission exercises its authority to ask for medical evidence prior to converting a claim from sickness benefits to regular EI benefits, you must provide a medical certificate completed by a doctor attesting that your health and physical capabilities allow you to commute to the place of work and to perform the work[1].

[14] The onus is on the Appellant to prove that she meets the requirements of the EI Regulations (*Attorney General of Canada v. Peterson A-370-95*). This includes the onus to provide valid evidence that can be independently verified and authenticated by the Commission.

Issue 1: Has the Appellant proven she is entitled to regular EI benefits as of August 5, 2019?

[15] I find that the Appellant has ***not*** proven her entitlement to regular EI benefits as of August 5, 2019.

[16] The Appellant was paid the maximum allowable number of weeks of sickness benefits, namely 15 weeks, between February 17, 2019 and June 8, 2019.

[17] To establish her claim for sickness benefits, she relied on a medical certificate dated March 14, 2019, which stated:

> "The above named patient has bilateral de Quervain's tenosynovitis which is preventing her from working as she gets pain in her bilateral hands.
>
> She is waiting to see a surgeon (*name redacted*). Unfortunately, the wait time for that appointment has been long. She was referred on October 16, 2018 but won't be able to see him until July 23, 2019.
>
> She cannot work until AT LEAST July 23, 2019 and will be assessed with respect to her working ability after seeing the specialist." (GD3-14)

[1] Section 9.0002 of the *Employment Insurance Regulations*

[18] The Appellant saw the specialist on July 23, 2019, at which time she received a steroid injection treatment. The specialist's note says, in part:

> "Clinically on examination today, she has the signs and symptoms of ongoing de Quervain's tenosynovitis. I have discussed with her the opportunity to consider reinjection with corticosteroid as there still is a chance that this may lead to permanent resolution, especially since she is no longer working at the same job where her symptoms began. We also discussed the alternative of surgical release of the first extensor compartment, but in my practice that is rarely necessary.
>
> Today she accepted an additional injection of 40mg of Kenalog along with Marcaine and lidocaine into the first extensor compartment of right wrist. She does understand there may be depigmentation of the skin or loss of some of the subcutaneous fat. Usually these changes resolve after a time. She may have an additional recurrence and if that should happen, I can see her once again to discuss surgical release." (GD3-54)

[19] She testified that the specialist told her she should refrain from using her wrist for 2 weeks and, after that, she could resume tasks that did not cause her to experience the original symptoms. She didn't go back to the surgeon because he told her "generally you can start after 15 days".

[20] After the two weeks had passed, she started looking for work. She has provided evidence of her job search record (GD3-52 to GD3-53).

[21] While I applaud the Appellant's efforts to find alternative employment, she was asked by the Commission on September 5, 2019 to provide a "medical note to support her availability for work and the date of recovery as well as any restrictions she may have" (see Supplementary Record of Claim at GD7-86 and Call Back at GD7-87). The Commission was within its authority under subsection 50(8) of the EI Act to make the request, and having done so, the Appellant was required to comply with the request by submitting a medical note with this information before her claim for regular EI benefits could start. The Appellant cannot avoid the Commission's request or the operation of section 9.0002 of the EI Regulations requiring the provision of a medical certificate attesting that her health and physical capabilities had improved and specifying the date she was capable of returning to work.

[22] The integrity of the sickness benefits program within the employment insurance plan depends on the provision of independent medical evidence certifying the very specific information stipulated in the legislation.

[23] To receive sickness benefits, a claimant must provide a medical certificate certifying two (2) distinct things:

a) that the claimant is unable to work because of illness, injury or quarantine; ***and***

b) the probable duration of the illness, injury or quarantine.[2]

[24] Upon provision of such a medical certificate, a claimant can receive up to a maximum of 15 weeks of benefits.

[25] But just because a sickness benefits claim is exhausted after 15 weeks does not mean that a claimant can automatically transition to regular EI benefits. Many illnesses, injuries and conditions can persist long after the 15-week benefit period has expired. A claimant must prove **both** their capability and availability for work in order to receive regular EI benefits. That is why the employment insurance legislation authorizes the Commission to require independent medical evidence to convert to regular EI benefits after receipt of sickness benefits. And that medical certificate must certify two (2) very specific things:

a) that the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work; ***and***

b) the date the claimant became capable of re-entering the workforce.[3]

[26] The Federal Court of Appeal has reinforced the requirement for a claimant to provide medical evidence after receipt of sickness benefits in order to prove availability by showing they are recovered enough to accept or return to work. The court has stated that it's not possible for a claimant's physical condition to support a finding of incapability as well as a finding of

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[2] Section 40 of the *Employment Insurance Regulations*
[3] Section 9.0002 of the *Employment Insurance Regulations*

capability[4]. In this way, the Commission may require the provision of separate medical certificates to establish the claim for sickness benefits ***and*** the conversion to regular EI benefits[5].

[27] In the present case, the Appellant's health status was in question and she was placing restrictions on her job search by avoiding the type of work she had previously done. On September 5, 2019, the Commission advised the Appellant she was required to provide a medical certificate from a doctor to prove her capability for work and her recovery date in order to convert her claim from sickness benefits to regular EI benefits (see GD7-86 to GD7-88). The Commission was within its authority to do so.

[28] The Appellant has no medical certificate certifying that her health issues were resolved and she could return to work as of August 5, 2019.

[29] Instead, the Appellant asks me to infer that she was medically capable of working as of August 5, 2019 based on the March 14, 2019 medical certificate, the July 23, 2019 specialist letter, and the fact that she was looking for work. She also submits that she should not be "punished" because she didn't know she needed a medical certificate "for EI".

[30] She argues that she was to be assessed after seeing the specialist on July 23, 2019, and that the specialist said further treatment in the form of surgical release was rarely necessary. She was treated on July 23, 2019 and then relied on the specialist's verbal advice that she should rest the wrist for two (2) weeks after the treatment, at which point she should be fine to work – albeit in a different type of job. She rested her wrist for 2 weeks and then started to look for work on August 5, 2019.

[31] I do not interpret the medical evidence this way.

[32] The first medical certificate has the words "AT LEAST" in all capital letters. That doctor was clearly emphasizing she could not work until at least July 23, 2019. The more appropriate inference is that the Appellant could easily have been unable to work for longer than that, and that further assessment would be required after she saw the specialist. Similarly, the statement by the specialist that a surgical remedy is "rarely necessary" is nothing more than a comment

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[4] *FCA A-179-13*
[5] Subsection 50(8) of the *Employment Insurance Act*

based on his experience. It is not based on a post-treatment examination of the Appellant. His suggestion that she rest the wrist for 2 weeks and then see how it felt does not override his closing comment that she "may have an additional recurrence". Moreover, there is nothing in the surgeon's letter that allows me to infer that the Appellant would be capable of returning to work 2 weeks after the treatment on July 23, 2019.

[33] There is no medical evidence certifying the Appellant's recovery and recovery date. In the absence of such evidence, her job search may be seen as evidence of a desire to return to work, but not necessarily of her capability to work.

[34] But even if I did agree with the Appellant's inferences (which I do not), I don't have the discretion to waive the Commission's request for medical evidence or the statutory requirement to provide a medical certificate in response to that request. I cannot vary the clear wording in the legislation, no matter how compelling the circumstances.

[35] I do not agree with the Appellant's submission that she is somehow being being punished. She was simply asked to comply with the statutory duties and obligations in place for all claimants who have received sickness benefits and subsequently ask for regular EI benefits.

[36] The Appellant received the maximum entitlement to sickness benefits on a claim immediately preceding her request for regular EI benefits as of August 5, 2019. The Commission asked her to prove her availability for work by providing a medical certificate certifying she was capable of returning to work. The Commission was entitled to ask for this. The Appellant must, therefore, provide a medical note certifying that she was recovered and ready to return to work as of August 5, 2019 in order to be entitled to receive regular EI benefits as of that date. She has not done so.

[37] I find that the Appellant has not satisfied the availability requirements to receive regular EI benefits as of August 5, 2019.

[38] As a result, she is disentitled on her claim for regular EI benefits from August 5, 2019.

[39] However, for the reasons set out in Issue 2 below, I find that this disentitlement must be terminated as of September 19, 2019.

Issue 2: Has the Appellant proven she is entitled to regular EI benefits as of September 19, 2019?

[40] The Appellant provided a doctor's letter dated September 19, 2019 (GD3-49), which the Commission accepted as a medical certificate certifying her capability for work as of that date (see Supplementary Record of Claim at GD3-55).

[41] The disentitlement on the Appellant's claim for regular EI benefits was then changed from an indefinite disentitlement as of August 5, 2019 to a definite period disentitlement running from August 5, 2019 to September 18, 2019 (see reconsideration decision letter at GD3-56).

[42] I agree with the Commission's reconsideration decision.

[43] By providing the doctor's letter dated September 19, 2019, the Appellant complied with the Commission's request for a medical certificate. The letter supports that she was capable of work as of September 19, 2019. This means she should only be disentitled to regular EI benefits for the period between August 5, 2019 (the date of she asked to start regular EI benefits) and September 18, 2019 (the last day before her proven capability date). This period corresponds to the disentitlement set out in the reconsideration decision letter.

[44] I therefore find that the disentitlement imposed on the Appellant's claim for regular EI benefits is correct.

[45] The disentitlement is over starting on September 19, 2019.

CONCLUSION

[46] The appeal is dismissed.

Teresa M. Day

Member, General Division - Employment Insurance Section

HEARD ON:	January 24, 2020 (Videoconference) and April 29, 2020 (On the Record)
METHOD OF PROCEEDING:	Videoconference and On the Record
APPEARANCES:	R. S., Appellant R. H., Representative for the Appellant