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

Citation: *RS v Canada Employment Insurance Commission*, 2020 SST 901

Tribunal File Number: AD-20-644

BETWEEN:

**R. S.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: October 19, 2020

Canada

## DECISION AND REASONS

### DECISION

[1] I am allowing the appeal. I am returning this matter to the General Division for a new hearing.

### OVERVIEW

[2] The Appellant, R. S. (Claimant), is appealing the General Division's decision.

[3] The Claimant applied for Employment Insurance regular benefits. The General Division found that the Claimant did not provide a medical certificate confirming that she was capable of working since August 5, 2019 until September 19, 2019. Because of this, the General Division decided that the Claimant was disentitled from getting regular benefits from August 5, 2019 to September 18, 2019.

[4] The General Division made a legal error when it decided that the Claimant had to provide a medical certificate. The medical certificate was to prove that she did not have a medical condition anymore and that she could start working again. The Commission agrees that this was a mistake.

[5] As the Respondent, the Canada Employment Insurance Commission (Commission), pointed out, the General Division made a second mistake. The General Division failed to provide the Claimant with a fair chance to present her case. It refused to accept extra medical evidence. The Claimant says that she could get a note from her doctor. Her doctor had told her she could start working again.

[6] The parties agree that the appeal should be allowed and that I return this matter to the General Division for a new hearing. This would give the Claimant a chance to get a note from her doctor.

### ISSUES

[7] The issues are as follows:

(a) Did the General Division make legal error when it said the Claimant had to provide a medical certificate?

(b) Did the Claimant get a fair chance to present her case?

**ANALYSIS**

[8] Section 58(1) of the *Department of Employment and Social Development Act,* lets the Appeal Division intervene in the General Division's decision. It can intervene if the General Division made an error of law or if there was a breach of natural justice.

**(a) Did the General Division make a legal error when it said the Claimant had to provide a medical certificate?**

[9] Yes. The General Division made a legal error when it said the Claimant had to provide a medical certificate.

[10] The General Division said that the Claimant had to provide a medical certificate. It said she had to provide this before she could prove that she was available for work.

[11] The General Division found that the Commission had the authority to ask for a medical note. It found that this authority came from section 50(8) of the *Employment Insurance Act* and section 9.0002 of the *Employment Insurance Regulations*. The General Division found that the medical certificate had to say the Claimant's health and physical capabilities had improved. It also had to say when she was capable of returning to work.

[12] Section 50(8) of the *Employment Insurance Act* states that the Commission may make claimants prove that they are making reasonable and customary efforts to obtain suitable employment. The section does not say anything about proving medical fitness or having to provide a medical certificate.

[13] Section 9.0002 of the Regulations lists the criteria for determining what suitable employment is, for the purposes of being available for suitable work. The list includes considering whether a claimant's health and physical capabilities lets that claimant commute to work and to perform the work.

[14] Section 9.0002 of the Regulations indicates that there must be evidence that a claimant has the health and physical capability to commute to work and to perform the work. However, the section does not say anything about having to provide a medical certificate upon request.

[15] At paragraph 4 of its decision, the General Division noted the Commission's argument. The Commission argued that the Claimant could not convert her claim from sickness benefits to regular benefits until she provided a medical certificate, in response to a request under section 40(1) of the Regulations.

[16] Section 40(1) of the Regulations reads as follows:

> The information and evidence to be provided to the Commission by a claimant in order to prove inability to work because of illness, injury or quarantine under paragraph 18(1)(b) or subsection 152.03(1) of the Act, is a medical certificate completed by a medical doctor or other medical professional attesting to the claimant's inability to work and stating the probable duration of the illness, injury or quarantine.

[17] The section talks about what information and evidence a claimant has to give to the Commission. However, the information and evidence that a claimant has to give relates to proving an inability to work because of illness, injury, or quarantine. Section 40(1) of the Regulations says nothing about having to provide information to prove ability to work following an illness. This is a fine distinction.

[18] The General Division also referred to a Federal Court of Appeal decision.[1] The General Division understood that the Federal Court of Appeal said that claimants who have received Employment Insurance sickness benefits have to provide medical evidence to prove that they have recovered enough to return to work. That way, they can prove they are available for work. But, as I wrote in my leave to appeal decision, the Federal Court of Appeal did not make any ruling, one way or the other, about whether claimants have to provide medical evidence to prove they are capable of returning to work after being sick.

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[1] *Ayai v Canada (Attorney General)*, 2013 FCA 294.

[19] There should have been some evidence to show that the Claimant was capable of working. But, this is different from actually having to file a medical certificate.

[20] The General Division made a legal error when it required the Claimant to produce a medical certificate before she could prove that she was available for suitable work.

### (b) Did the Claimant get a fair chance to present her case?

[21] No. The Claimant did not get a fair chance to present her case.

[22] At the General Division hearing, the Claimant stated that she could go to her doctor and get a note from him. He had verbally told her she could return to work in two weeks. She expected he would write a note to confirm what he had told her. She claims this medical evidence would have proven that she was capable of working by August 5, 2019.

[23] The member said that it was unnecessary for the Claimant to get a medical note because it was now "after the fact."[2]

[24] The General Division was aware of the Claimant's claims that the doctor had verbally told her that she could return to work. But, the General Division found that the medical evidence on file did not support the Claimant's claims. The General Division found that if the doctor had in fact given her this advice, he likely would have written this in his report. For this reason, the General Division did not accept the Claimant's evidence that her doctor told her she could return to work in two weeks.

[25] The Claimant did not know the General Division would reject her evidence that the doctor told her she could return to work. After all, she likely would not have started looking for work in August 2019 if he had not told her she could look for and return to work.

[26] The Commission argues the General Division was unreasonable. It was unreasonable when it refused to accept medical evidence that was on a central issue. The Commission argues that the General Division should have let the Claimant get the medical note from her doctor. The

[2] At approximately 31:27 to 31:32 of the audio recording of the General Division hearing.

Commission argues that the General Division should have then accepted this new medical evidence.

[27] The Claimant asked for a chance to get a note from her specialist. The General Division could have either adjourned the hearing to let the Claimant get the note from her doctor. Or, the General Division could have finished the hearing and let the Claimant get the medical note before it issued its decision.

[28] Given the circumstances, I accept the Commission's arguments that the Claimant did not get a fair chance to present her case.

**REMEDY**

[29] To be eligible for regular benefits, the Claimant still has to prove that she was capable and available to work. The General Division's errors do not mean the Claimant has proven that she was capable or available to work. Indeed, the General Division found that the medical evidence fell short of proving that the Claimant was capable of working.[3]

[30] The Claimant maintains that her specialist told her that after about two weeks, she could start using her wrist, if it did not cause her any symptoms. However, the specialist did not mention this in his report of July 23, 2019, when he assessed the Claimant.

[31] The Claimant was no longer working at the same job. She had left that job because of her symptoms. The specialist gave her an injection into her right wrist. He suggested she could consider surgery if she continued to have problems with her right wrist.[4] He did not say in his report whether she was capable of performing other work.

[32] The Claimant's family doctor recommended that the Claimant avoid repetitive work that involved her hands. He also identified a suitable occupation. But, he did not say anything about her condition or capability for work between August 5 and September 19, 2019.[5]

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[3] General Division decision at paras. 31 to 33.
[4] See orthopaedic surgeon's consultation report dated July 23, 2019, at GD2-14, GD3-62, and GD7-100.
[5] See family physician's medical letter dated September 19, 2019, at GD2-15, GD3-58, and GD7-136.

[33] None of the medical evidence addressed whether the Claimant was capable of working any time between August 5, 2019 and September 19, 2019.

[34] In light of this, the parties agree that the appropriate remedy is to return this matter to the General Division for a new hearing. That way, the Claimant can get the medical information she needs to support her claim. She should file any new medical information with the Social Security Tribunal.

[35] The Claimant should be mindful of the Commission's position. If the medical evidence were to show that the Claimant was physically incapable of any kind of employment between August 5 and September 19, 2019, the Commission could find that she was incapable of employment. She would be ineligible for any regular benefits.

[36] Even if the medical evidence were to show that the Claimant was physically capable of employment between August 5 and September 19, 2019, she would still have to show that she was available for work.

[37] The courts have said that determining a claimant's availability must be determined by analyzing three factors. These factors are known as the "Faucher factors."[6] They include:

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

ii. the expression of that desire through efforts to find a suitable job, and

iii. not setting personal conditions that might limit the chances of returning to the labour market.

[38] I note that there may also be the issue of a disqualification. The General Division found that the Claimant voluntarily left her employment on February 8, 2019 without just cause. It found that she was disqualified from receiving Employment Insurance benefits as a result. The disqualification was suspended for those weeks during which the Claimant was entitled to special benefits.

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

[39] The parties did not address the issue of the disqualification. I am therefore not drawing any conclusions on the matter.

**CONCLUSION**

[40] The appeal is allowed. This matter is returned to the General Division for a new hearing.

Janet Lew
Member, Appeal Division

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| HEARD ON: | October 6, 2020 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | R. S., Appellant<br><br>R. H., Representative for the Appellant<br><br>M. Allen, Representative for the Respondent |