Citation: *KN v Canada Employment Insurance Commission*, 2021 SST 443

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	K. N.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated March 6, 2021 (GE-21-272)

Tribunal member:	Janet Lew
Decision date:	August 26, 2021
File number:	AD-21-126

Decision

[1] The appeal filed by the Applicant, K. N. (Claimant), does not have a reasonable chance of success. For that reason, I am refusing the Claimant's application to move ahead with his appeal. The appeal will not proceed.

Overview

[2] The Claimant is appealing the General Division decision of March 6, 2021. The General Division found that the Claimant had not shown that he was capable of work. It decided that the Claimant was disentitled to Employment Insurance regular benefits. The General Division also found that the Claimant had already received the maximum amount of sickness benefits that he could get. It decided that he could not receive more sickness benefits.

[3] The Claimant argues that the General Division made several important factual mistakes.

[4] I have to decide whether the appeal has a reasonable chance of success.[1] Having a reasonable chance of success is the same thing as having an arguable case.[2]

[5] I am not satisfied that there is an arguable case that the General Division made any factual errors about any advice the Claimant received from Service Canada, and whether the Claimant was capable of working. Therefore, I am not giving permission to the Claimant to move ahead with his appeal. This ends the Claimant's appeal.

Issue

[6] Is there an arguable case that the General Division made any factual mistakes about (i) the advice the Claimant received from Service Canada and (ii) whether the Claimant was capable of working?

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[1] Under section 58(1) of the *Department of Employment and Social Development Act*, I am required to refuse permission for leave to appeal if I am satisfied, "that the appeal has no reasonable chance of success."
[2] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

Analysis

[7] The Appeal Division must be satisfied that the appeal has a reasonable chance of success before it gives a claimant permission to go ahead with their appeal. A reasonable chance of success exists if there is a certain type of error.[3] These errors are about whether the General Division:

(a) Failed to make sure that the process was fair;

(b) Failed to decide an issue that it should decided, or decided an issue that it should not have decided;

(c) Made an error of law; or

(d) Based its decision on an important factual error. (The error has to be perverse, capricious, or without regard for the evidence before it.)

[8] Once an applicant gets permission from the Appeal Division, they move to the actual appeal. There, the Appeal Division will decide whether the General Division made an error and, if so, will decide how to fix that error.

Background facts

[9] The Claimant applied for regular benefits on February 22, 2019.[4] He applied for sickness benefits on November 27, 2019.[5]

[10] The Claimant's family doctor prepared a medical certificate dated November 27, 2019.[6] The doctor was of the opinion that the Claimant became unable to work on November 1, 2019, because of severe osteoarthritis of his lower extremities. The doctor was also of the opinion that the Claimant would be incapable of working until March 31, 2020.

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[3] See section 58(1) of the *Department of Employment and Social Development Act*.
[4] See Claimant's application for regular benefits, at GD3-3 to GD3-13.
[5] See Claimant's application for sickness benefits, at GD3-16 to GD3-28.
[6] See Medical Certificate dated November 27, 2019, at GD3-29.

[11] The Claimant spoke with Service Canada. He told them he had limited capabilities. He could no longer work in his previous trade because it was too physically demanding. But, he felt he could do desk work and limited driving. Service Canada advised him to "provide acceptable medical proof supporting his or her limited capabilities situation."[7]

[12] The Claimant produced a second medical certificate, also dated November 27, 2019, from the same family doctor.[8] This time, the doctor was of the opinion that the Claimant became unable to work on May 30, 2019. The doctor was also of the opinion that the Claimant would be incapable of working until March 31, 2020.

[13] At some point, the Claimant told Service Canada that he doubted that he could do a desk job either. He had hip replacement surgery scheduled for March 18, 2020. Service Canada then converted his claim from regular to sickness benefits, effective May 30, 2019.[9]

[14] Service Canada advised the Claimant that there is a maximum of 15 weeks of sickness benefits. So, in the Claimant's case, sickness benefits were exhausted as of September 14, 2019. Service Canada determined that the Claimant was not capable of working after that date. So, the Claimant did not receive regular benefits after September 14, 2019.[10]

[15] The Claimant challenged this decision. Although the medical evidence did not support him, he felt he was fit for work in other occupations.[11]

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[7] See Supplementary Record of Claim dated December 10, 2019, at GD3-31.
[8] See Medical Certificate dated November 27, 2019, at GD3-32.
[9] See Service Canada Investigation Information Sheet dated January 17, 2020, at GD3-34 to GD3-35.
[10] See Service Canada's letter dated January 17, 2020, at GD3-37 to GD3-38.
[11] See Supplementary Record of Claim dated December 10, 2019, at GD3-43.

Is there an arguable case that the General Division made important factual errors?

– **the advice the Claimant received from Service Canada**

[16] The Claimant argues that the General Division failed to consider some of the evidence. He says, "[i]nitial records of what I was originally told were not referred to at any point." In particular, he says that the General Division should have referred to the fact that Service Canada advised him to exhaust his regular benefits before applying for sickness benefits. He wrote, "Another important error in fact is that I was told I needed to wait until my regular E.I. ran out before applying for medical E.I."[12]

[17] There was some evidence that the Claimant received this advice from Service Canada. When the Claimant requested a reconsideration, he wrote, "[he] could not apply for Medical EI until [his] Regular EI claim ran out."[13] He said this conversation took place perhaps in summer 2019.[14]

[18] The Claimant argues that the General Division failed to refer to the fact that he received advice from Service Canada. But, in fact, the General Division noted this evidence at paragraphs 11 and 20.

[19] The Claimant seems to be suggesting that he followed advice from Service Canada to his detriment. But, he does not explain how any of this evidence would have changed the General Division's decision. The General Division examined whether the Claimant was capable of and available for work during the period of disentitlement from September 15, 2019 to November 2, 2019. Any advice that the Claimant received from Service Canada was irrelevant to the issue of whether the Claimant was capable of and available for work.

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[12] See Claimant's submissions to the Appeal Division, dated August 23, 2021, at AD8-1.
[13] See request for reconsideration, at GD3-46.
[14] See Supplementary Record of Claim dated March 4, 2020, at GD3-47.

[20] The General Division also noted the Claimant's evidence that he was unaware that there was a maximum of 15 weeks of sickness benefits. And, if he knew this, he would have approached the situation differently. It seems the Claimant is suggesting:

i. That Service Canada should have advised him to apply for medical benefits once he was incapable of working. That way, he would have applied early on and not collected as much in the way of regular benefits that the Commission now requires him to repay, or

ii. That Service Canada should not have advised him to get a second medical certificate. This certificate says he was incapable of working after May 30, 2019. He says that if he did not get this certificate, he would have qualified for and received regular benefits after May 30, 2019. And, he would not have had to repay any benefits.

[21] If the Claimant is suggesting that he received erroneous advice from Service Canada, it would not help him. This is because the *Employment Insurance Act* does not provide any relief to claimants who receive erroneous advice or misinformation, even if that advice comes from the Commission or Service Canada.

[22] If the Claimant is suggesting that he should be relieved of any overpayment because Service Canada did not give him all the information he needed, again, it would not help him. The courts have consistently held that, fundamentally it is the responsibility of a claimant to inform themselves and attempt to understand their entitlement options.[15]

[23] I am not satisfied that the General Division overlooked the fact that the Claimant had received advice from Service Canada that he should hold off on applying for sickness benefits. The General Division in fact referred to this evidence. And, it did not have any impact on the issue of whether he was capable of working.

[15] See, for example, *Canada (Attorney General) v Kaler*, 2011 FCA 266.

– The issue over whether the Claimant was capable of working

[24] The Claimant argues that the General Division made a factual error over whether he was capable of working. The Claimant wrote, “There was a discrecency [*sic*] from December 2019 in that the board indicated that I was able to work.”

[25] The Claimant provided a copy of his family doctor’s medical letter dated April 20, 2021. The doctor explained why he gave conflicting dates of disability for the Claimant. He concluded that there was actually another period of disability—from September 15, 2019 to March 31, 2020.

[26] The General Division was aware of the Claimant’s assertions that he was capable of working after May 30, 2019. The Claimant said he was capable of doing some limited work.

[27] However, the General Division could only make findings based on the evidence before it. The Claimant did not get the doctor’s letter of April 20, 2021, until after the General Division issued its decision. The General Division did not have a copy of the doctor’s opinion of April 20, 2021.

[28] Even so, the General Division looked to see whether there was any other medical or other evidence that could have supported the Claimant’s allegations that he was capable of working after May 30, 2019. The General Division did not see any evidence to support the claim that he was capable of working after May 30, 2019.

[29] The General Division relied on the following:

- The family doctor’s (second) medical certificate said the Claimant was incapable of working as of May 30, 2019, and
- The Claimant also testified that he was told in approximately May or June 2019 that he should not work to prevent further damage. He would be put on a list for hips and knees replacement.[16]

[16] See General Division decision, at para. 21.

[30] The General Division found that the Claimant's statements to the Commission and his testimony supported a finding that he was incapable of working after May 30, 2019.

[31] The General Division found that the Claimant did not prove that he was capable of working. It said that the Claimant's feelings that he might be able to work with his condition "do not outweigh the medical evidence."[17]

[32] Based on the evidence before it, the General Division was entitled to conclude that the Claimant was capable of working. Even if the General Division had the doctor's third opinion that the Claimant was actually disabled from September 15, 2019 to March 31, 2020, the General Division could have and likely would have rejected it.

[33] After all, the Claimant had received other medical advice from specialists that contradicted the family doctor's opinion. According to the Claimant, the specialists said he should stop working. This would minimize damage to his hips and knees. And, on top of that, they said he should have replacement hips and knees surgery. They put him on a list for this surgery.

[34] The Claimant may be relying on the April 2021 medical letter in the hopes that I will reassess the evidence and decide whether he was capable of working up to September 15, 2019. But, the Appeal Division typically does not consider new evidence, though there are exceptions to this general rule. Even if I could consider this new evidence, it does not relate to any of the errors that the General Division might have made.

[35] The Appeal Division does not conduct any reassessments either. Even if it did, I would not have found the family doctor's third report very persuasive. He simply provided a bald-face statement. He did not explain why there was now a third disability period. He also did not address the specialist's opinion that the Claimant should stop working to prevent further damage.

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[17] See General Division decision, at para. 36.

[36] I am not satisfied that there is an arguable case that the General Division made a factual error over whether the Claimant was capable of working. The General Division drew findings that were consistent with the evidence before it.

Conclusion

[37] The Claimant does not have an arguable case, so I am refusing the Claimant's application. This means the Claimant will not be moving ahead to the next stage of the appeal. This ends his appeal.

Janet Lew
Member, Appeal Division