



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *KN v Canada Employment Insurance Commission*, 2021 SST 444

Tribunal File Number: GE-21-272

BETWEEN:

K. N.

Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Gary Conrad

HEARD ON: March 4, 2021

DATE OF DECISION: March 6, 2021

DECISION

[1] The appeal is dismissed. The Claimant has not shown that he was capable of work. This means the disentitlement imposed by the Commission is upheld.

Overview

[2] The Claimant applied for regular employment insurance (EI) benefits with a benefit period effective February 3, 2019.

[3] On November 27, 2019, the Claimant applied for sickness benefits. He sent in a medical certificate¹ that said he was unable to work from November 1, 2019, to March 31, 2020.

[4] On December 10, 2019, he spoke to the Commission and told them he could not work a physical job since about May or June 2019 and could only do desk work and limited driving. The Commission noted this was different than the medical certificate he had sent in and they asked him to provide evidence of the new information on his limited ability to work².

[5] The Claimant sent in another medical certificate on December 12, 2019, which said he was unable to work from May 30, 2019, to March 31, 2020³.

[6] The Commission spoke to the Claimant on January 17, 2020, to get more information due to the two different medical certificates. The Claimant told the Commission he did not think he could really have done any type of work due to his medical condition and he was waiting for hip replacement surgery on March 18, 2020⁴.

[7] The Commission asked the Claimant why he had been completing reports from May 30, 2019, onward when he was collecting regular EI benefits saying he was able to work and was looking for work if that was not the case⁵.

¹ GD03-29

² GD03-31

³ GD03-32

⁴ GD03-35

⁵ GD03-35

[8] The Claimant told the Commission it was due to pride, he did not want to accept that he could not work.

[9] The Commission decided to grant the Claimant sickness benefits, starting June 2, 2019. While the Claimant had received regular EI benefits from February 3, 2019, to November 2, 2019, the Commission converted his benefits from June 2, 2019, to September 14, 2019, from regular EI to sickness benefits⁶. The Commission says the reason they converted that period only is that sickness benefits can only be granted for 15 weeks⁷.

[10] The Commission then determined they could not grant the Claimant any regular benefits after his sickness benefits ended as they determined he was not capable of working after September 14, 2019. This means the Commission says the Claimant is not entitled to the regular benefits he had already been paid from after his sickness benefits ended, they disentitled him from September 15, 2019, to November 2, 2019, so they wanted him to pay those benefits back.

[11] The Claimant argues he was told by the Commission he could not apply for sickness benefits until his regular EI benefits had ended so that is what he did and if he did something wrong it was the Commission's fault, they should have told him not to wait or have denied his sickness benefits when he applied for them after his regular EI ran out⁸.

Issue

[12] Was the Claimant capable of and available for work?

Analysis

[13] The Act says that a claimant has to prove they are “capable of and available for work” but are not able to find a suitable job.⁹ Case law gives three things a claimant has to prove to show that they are “available” in this sense.¹⁰ I will look at those factors below.

⁶ GD03-37

⁷ GD03-37

⁸ GD02-4

⁹ See section 18(1)(a) of the Act.

¹⁰ See *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

[14] The Commission decided that the Claimant was disentitled from receiving benefits because he was incapable of work and he had not shown that had changed and that he was actively seeking work.

Capable of and available for work

[15] The Commission submits they were unaware of the Claimant's health situation until his medical notes were provided. The Commission says it was up to the Claimant to address the matter by completing his reports correctly and in a timely manner, by stating he was not capable of working during the period his doctor's medical notes stated he was not able to work.

[16] The Commission submits that unfortunately the benefits paid to the Claimant from September 15, 2019, onward created an overpayment, as he had not shown entitlement to regular benefits due to being incapable of working and could not be paid more sickness benefits.

[17] The Claimant submitted two medical notes. The first one, dated November 27, 2019, says the Claimant is incapable of working from November 1, 2019, to March 31, 2020¹¹. The second medical note, dated November 27, 2019, says the Claimant is unable to work from May 30, 2019, to March 31, 2020¹².

[18] The Claimant also told the Commission that he could not work in the drywall industry since May or June 2019 and could not bend down anymore due to his medical condition as both hips and knees were shot¹³.

[19] The Claimant says he was looking for a sit-down job between February 3, 2019, to November 2, 2019, but he was not sure he could even do such a job and his hip replacement surgery was scheduled for March 18, 2020. The Claimant said he was completing claim reports saying he could work as he did not want to accept he could not work and he hopes that he will be able to work after his surgery¹⁴.

¹¹ GD03-29

¹² GD03-32

¹³ GD03-34

¹⁴ GD03-35

[20] The Claimant testified he was told by the Commission he could not start medical benefits until his regular benefits were done. So, he waited until his regular benefits ran out and then applied for medical benefits. The Claimant says he was never told that sickness benefits were only 15 weeks. He says if he knew this he would have approached the situation differently.

[21] The Claimant testified he was referred by his doctor to the hip and knee clinic at the hospital and was told in approximately May or June 2019, that he should not work to prevent further damage and they would put him on the replacement list for his hips and knees.

[22] The Claimant says the second medical note, the one which says he was incapable of work from May 30, 2019, was his doctor's idea and not his and he feels he should have looked at it more closely and had a discussion about it with his doctor.

[23] The Claimant says that he was looking for work, from May to November 2019 and beyond, trying to find a position that he could do with his condition such as working at an order desk or maybe driving a delivery truck, but, he had problems, as he was computer illiterate and even delivery driver could require manual labour.

[24] The Claimant says he was not making lists of the places he was applying at as he was working through his contacts and trying to find work through word of mouth as that is how it was done in his industry and how he had done it for decades.

Capability

[25] I find the Claimant has not proven he was capable of working for the period of the disentitlement, September 15, 2019, to November 2, 2019. I find the second medical note submitted by the Claimant states that he is incapable of working from May 30, 2019, to March 31, 2020, which was also supported by the Claimant in his statements to the Commission and in his testimony that his doctors told him to stop working to minimize damage. Therefore, I find the second medical note accurately reflects the Claimant's medical condition and the time period of his incapacity.

[26] I find that as this period of incapacity starts before and ends after, the period of the disentitlement, the Claimant was not capable of working during the period of the disentitlement.

[27] I find that while the Claimant says he was looking for work during the period his doctor says he was unable to work as he still felt he might be able to do a less labour intensive job, that feeling is not enough to overcome the information from his medical professional stating otherwise and his own testimony about what the doctors at the hip and knee clinic told him.

Availability

[28] Case law sets out three factors for me to consider when deciding whether the Claimant was capable of and available for work but unable to find a suitable job. The Claimant has to prove the following three things:¹⁵

- a) He wanted to go back to work as soon as a suitable job was available.
- b) He has made efforts to find a suitable job.
- c) He did not set personal conditions that might have unduly (in other words, overly) limited his chances of going back to work.

[29] When I consider each of these factors, I have to look at the Claimant's attitude and conduct.¹⁶

– Wanting to go back to work

[30] The Claimant has shown that he wanted to go back to work as soon as a suitable job was available. I find the Claimant wanted to go back to work. I have no doubts he would have rather been working than not working. I find the fact he says he was still trying to find some job that he might be able to do with his physical limitations demonstrates his sincere desire to work.

– Making efforts to find a suitable job

[31] The Claimant did make enough effort to find a suitable job.

¹⁵ These three factors appear in *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96. This decision paraphrases those three factors for plain language.

¹⁶ Two decisions from case law set out this requirement. Those decisions are *Canada (Attorney General) v Whiffen*, A-1472-92; and *Carpentier v Canada (Attorney General)*, A-474-97.

[32] While the Claimant had not kept a written list of places to which he applied, I accept his testimony that he was working his contacts to try and find work he could do with his physical limitations. It is common knowledge that a job can be found and secured through word of mouth and contacts, thus, the Claimant was making efforts that could have resulted in employment. Further, I note there is nothing in the law demanding the Claimant produce a written list of places he has applied to in order to demonstrate availability.

[33] I further note the Claimant's testimony that through contacts and word of mouth is how he has always found his work and that he is computer illiterate. I do not think it should be held against the Claimant that he did not do the usual method nowadays of applying online or by printing out resumes and sending them in; there is nothing in the law about how the Claimant must apply for jobs to be considered available.

– **Unduly limiting chances of going back to work**

[34] The Claimant did not set personal conditions that might have unduly limited his chances of going back to work.

[35] I find that while the Claimant had physical limitations that would impact his ability to work, these physical limitations were not set by him; he did not choose to have his knees and hips degrade.

– **So, was the Claimant capable of and available for work?**

[36] Based on my findings on the three factors, I find that the Claimant has not shown that he was capable of and available for work but unable to find a suitable job. While he did meet the three factors the Court¹⁷ has said I need to consider for availability he has not proven he was capable of working as his feelings he might be able to work with his condition do not outweigh the medical evidence and the law¹⁸ requires both capability and availability to get benefits.

¹⁷ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96

¹⁸ Paragraph 18(1)(a) of the *Employment Insurance Act*

[37] Further, I agree with the submission of the Commission the Claimant could not be paid any more weeks of sickness benefits as he was paid 15 weeks, and that is the maximum under the law¹⁹.

¹⁹ Paragraph 12(3)(c) of the *Employment Insurance Act*

Conclusion

[38] The Claimant has not shown that he was available for work within the meaning of the law. Because of this, I find that the disentitlement imposed by the Commission is upheld.

[39] This means that the appeal is dismissed.

Gary Conrad

Member, General Division - Employment Insurance Section

HEARD ON:	March 4, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. N., Claimant