



Citation: *HA v Canada Employment Insurance Commission*, 2021 SST 886

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant:

H. A.

Respondent:

Canada Employment Insurance Commission

Decision under appeal:

Canada Employment Insurance Commission
reconsideration decision (433683) dated September 13,
2021 (issued by Service Canada)

Tribunal member:

Gary Conrad

Type of hearing:

Teleconference

Hearing date:

October 26, 2021

Hearing participant:

Appellant

Decision date:

November 3, 2021

File number:

GE-21-1816

Decision

[1] The appeal is allowed. The Claimant has proven he is capable of work and available. Therefore, he is not disentitled from benefits.

OVERVIEW

[2] Claimants have to be available for work in order to get regular employment insurance (EI) benefits. Availability is an ongoing requirement; claimants have to be searching for a job.

[3] The Commission decided that the Claimant was disentitled from being paid EI benefits from December 20, 2020.¹

[4] The Claimant says that despite the fact he is getting Canada Pension Plan (CPP) disability benefits he is still working. He works 12 hours a month as a security guard.

[5] The Commission says that in order to get CPP disability you need to be regularly incapable of any work, which is the opposite of being available for work, thus the Claimant is not available.²

[6] I must decide whether the Claimant has proven³ that he is capable of and available for work.

Matter I have to consider first

[7] In their submissions the Commission states they disentitled the Claimant under subsection 50(8) of the *Employment Insurance Act* (Act). Subsection 50(8) of the Act relates to a person failing to prove to the Commission that they were making reasonable and customary efforts to find suitable employment.

¹ See GD03-191 which upholds GD03-183

² GD04-4

³ The Claimant has to prove this on a balance of probabilities, which means it is more likely than not.

[8] In looking through the evidence, I did not see any requests from the Commission to the Claimant to prove his reasonable and customary efforts, or any claims from the Commission that if they did, his proof was insufficient.

[9] I further find the Commission did not make any detailed submissions on how the Claimant failed to prove to them that he was making reasonable and customary efforts; the Commission only summarized what the legislation says in regard to subsection 50(8) of the Act and what it says about reasonable and customary efforts.

[10] Based on the lack of evidence the Commission asked the Claimant to prove his reasonable and customary efforts to find suitable employment under subsection 50(8) of the Act, the Commission did not disentitle the Claimant under subsection 50(8) of the Act. Therefore, it is not something I need to consider.

Issues

[11] Is the Claimant capable of and available for work?

Analysis

[12] The law requires claimants to show that they are available for work.⁴ In order to be paid EI benefits, claimants have to be capable of and available for work and unable to find suitable employment.⁵

Capability

[13] I find the Claimant is capable of work.

[14] The Commission submits the Claimant started receiving a CPP Disability pension in December 2020.

⁴ Paragraph 18(1)(a) of the *Employment Insurance Act* provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which he or she fails to prove that on that day he or she was capable of and available for work and unable to obtain suitable employment.

⁵ Paragraph 18(1)(a) of the *Employment Insurance Act*.

[15] The Commission submits that CPP disability benefits and EI regular benefits are mutually exclusive as CPP benefits require that a person be regularly incapable of any work, which is the opposite of being available for work.⁶

[16] The Claimant says he is working in his usual job as a security guard; however, he can only work 12 hours a month due to his disability.

[17] I find the fact the Claimant is getting CPP disability benefits is not determinative of whether he is available or not.

[18] First, I note that a decision on CPP disability benefits is not binding on me. Second, the criteria for availability is different than that of CPP disability. Third, the Commission has actually misstated the test for a severe disability in connection with CPP disability. The law states that a person must be "...incapable regularly of pursuing any substantially gainful occupation..."⁷ It does not say a person must be, or is, incapable of all work to get CPP.

[19] I find the decision of the Appeal Division, *M. L. v. Canada Employment Insurance Commission*, 2019 SST 674, persuasive in its statement that having qualified for CPP does not automatically mean a person is unavailable.

[20] The Claimant testified he is working. The Record of Employment⁸ he submitted further supports the Claimant is working.

[21] The Claimant says he is working in his usual occupation, that of a security guard, but he is just working significantly less hours due to his disability.

[22] I find that the Claimant is working, in suitable employment, showing he is capable of working.

⁶ GD04-4

⁷ Subparagraph 42(2)(a)(i) of the *Canada Pension Plan*

⁸ GD05-2

[23] I find the employment of security guard is suitable employment as the Claimant's health and physical capability allows him to perform the work⁹ as shown by the fact he has been, and still is, working in that position.

Available

[24] The Claimant has to prove three things to show he is available:

1. A desire to return to the labour market as soon as a suitable job is available
2. That desire expressed through efforts to find a suitable job
3. No personal conditions that might unduly limit his chances of returning to the labour market¹⁰

[25] I have to consider each of these factors to decide the question of availability,¹¹ looking at the attitude and conduct of the Claimant.¹²

Does the Claimant have a desire to return to the labour market as soon as a suitable job was available?

[26] I find the Claimant has shown a desire to return to the labour market as soon as a suitable job was available.

[27] The Claimant testified that he was diagnosed with liver cancer and it is spreading.

[28] The Claimant says he cannot simply sit around and be sick, he needs to get out and work and do something to feel good about himself. The Claimant says it is not as if he is 90 years old, so he still wants to work.

⁹ Paragraph 9.002(1)(a) of the *Employment Insurance Regulations*

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

¹¹ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹² *Canada (Attorney General v Whiffen*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

[29] I find the Claimant working, despite his severe medical condition, amply demonstrates his desire to be in the labour market.

Has the Claimant made efforts to find a suitable job?

[30] Yes, the Claimant has made efforts to find a suitable job.

[31] The Claimant is currently working as a security guard for 12 hours a month. His record of employment supports his testimony.¹³

[32] Further, his claimant reports support his testimony that he started working in December 2020, as he reported that he worked and earned wages in the week of November 29, 2020, to December 05, 2020.¹⁴ Further, he continues reporting work in his claimant reports which run until June 19, 2021.

[33] I find that as the Claimant was employed starting December 2020, the start of the disentitlement, and is currently employed, he has made sufficient efforts to find suitable employment; he secured a job and that job is suitable, as I have found above, as it works with his disability.

Has the Claimant set personal conditions that might unduly limit his chances of returning to the labour market?

[34] I find the Claimant has not set personal conditions that might unduly limit his chances of returning to the labour market.

[35] I find the Claimant's illness is not a personal condition.

[36] The Claimant did not choose to get sick and he did not decide what limitations his illness will place on him. I note that even with the limitation in the hours the Claimant can work, he still found, and has retained, suitable employment.

¹³ GD05-2

¹⁴ GD03-50

[37] I find that as the Claimant found work, and is working, to his maximal capacity at suitable employment, clearly he does not have any personal conditions that might unduly limit his chances of returning to the labour market, as he has already returned to the labour market, despite his illness.

Was the Claimant capable of and available for work and unable to find suitable employment?

[38] Considering my findings on each of the three factors together, I find that the Claimant is capable of and available for work and has proven his availability.¹⁵

CONCLUSION

[39] The appeal is allowed.

Gary Conrad
Member, General Division – Employment Insurance Section

¹⁵ Paragraph 18(1)(a) of the *Employment Insurance Act*.