Citation: *Canada Employment Insurance Commission v AG*, 2022 SST 226

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	Canada Employment Insurance Commission
Representative:	Angèle Fricker
Respondent:	A. G.

Decision under appeal:	General Division decision dated December 10, 2021 (GE-21-1994)

Tribunal member:	Janet Lew
Type of hearing:	Teleconference
Hearing date:	March 10, 2022
Hearing participants:	Appellant's representative Respondent
Decision date:	April 6, 2022
File number:	AD-21-454

Decision

[1] The appeal is allowed in part. The General Division erred by failing to consider whether the condition of the Respondent, A. G. (Claimant), was urgent when it examined whether medical treatment she sought was readily or immediately available where she lives in Canada. However, the General Division's error does not change the outcome. The Claimant was not disentitled from receiving Employment Insurance benefits from May 24 to July 15, 2021 when she was outside Canada.

Overview

[2] The Appellant, the Canada Employment Insurance Commission (Commission), is appealing the General Division decision. The General Division decided that the Claimant was entitled to Employment Insurance benefits from May 24 to July 15, 2021, when she was outside Canada. It found that she fell into one of the exceptions to the general rule that claimants cannot receive Employment Insurance benefits while outside Canada.

[3] The Commission argues that the General Division made legal and factual errors. The Commission asks me to allow the appeal and give the decision that it says the General Division should have given. It says that the General Division should have decided that the Claimant did not meet any of the exceptions to the general rule against receiving benefits while outside Canada.

[4] The Claimant argues that her particular circumstances fall within one of the exceptions and that she therefore was entitled to receive Employment Insurance benefits while outside Canada. In particular, she argues that she was outside Canada for the purposes of undergoing medical treatment that was not readily or immediately available where she lives in Canada.

[5] The General Division erred by failing to consider whether the Claimant's condition was urgent when it examined whether medical treatment was readily or immediately available where she lives in Canada.

[6] There was evidence that the Claimant's medical condition required urgent treatment. Given this context, medical treatment was not readily or immediately available where she lives. The Claimant is not disentitled from receiving Employment Insurance benefits for the reason that she was outside Canada.

Issue

[7] The issue in this appeal is:

> Did the General Division misinterpret what it means to be "readily or immediately available" under section 55(1)(a) of the *Employment Insurance Regulations*?

Analysis

[8] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.[1]

Did the General Division misinterpret what it means to be "readily or immediately available" under section 55(1)(a) of the *Employment Insurance Regulations*?

[9] The Commission argues that the General Division misinterpreted what it means to be "readily or immediately available" under section 55(1)(a) of the *Employment Insurance Regulations* (Regulations). The Commission argues that the Claimant did not meet the requirements of section 55(1)(a) of the Regulations. It argues that she was therefore disentitled from receiving Employment Insurance benefits.

[10] Section 55(1) of the Regulations provides exceptions to the general rule that a claimant is disentitled from receiving benefits while outside Canada. One of these exceptions is (a) if a claimant undergoes medical treatment at a hospital, medical clinic or similar facility outside Canada "that is not readily or immediately available in the claimant's area of residence in Canada."[2]

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[1] See section 58(1) of the *Department of Employment and Social Development Act*.
[2] Section 55(1)(a) of the *Employment Insurance Regulations*.

[11] Neither the *Employment Insurance Act* nor the Regulations define “readily or immediately available.”

- **The General Division decision**

[12] The General Division found that the medical treatment that the Claimant had outside Canada was not readily or immediately available in Canada, for the following reasons:

- On May 15, 2021, the Claimant received an appointment for an MRI for August 5, 2021. She was unable to find an earlier appointment anywhere else. The Claimant would have to wait at least 2.5 months before getting the MRI in Canada.

- Further, the MRI appointment form said that often, unforeseen circumstances could delay the appointment. The General Division understood that this meant that there was a chance the MRI might not go ahead on August 5, 2021.

- When the Claimant contacted a specialist, she got an appointment for the end of July 2021.

[13] The General Division found that the Claimant did not have to prove that someone referred her for treatment outside Canada, or that the treatment was required on an immediate basis. The General Division found that these were irrelevant considerations.

- **The Commission’s arguments**

[14] The Commission argues that, as neither the *Employment Insurance Act* nor the Regulations define “readily or immediately available,” the expression has to be assessed on a case-by-case basis.

[15] The Commission argues that, when determining whether the medical treatment was readily or immediately available in the Claimant’s area of residence in Canada, the General Division failed to consider the following:

- The realities of the medical system in Canada, and

- Whether there was an element of urgency to the medical treatment

[16] The Commission argues that, while the Claimant was able to schedule an MRI outside Canada within a couple of weeks, that it did not mean that that same treatment was not readily or immediately available in Canada, even if she had to wait 2.5 months for it. The Commission says that what is readily or immediately available has to reflect the realities of the Canadian medical system. And, the Commission argues that waiting 2.5 months for an MRI is, in the whole scheme of things, considered readily or immediately available in Canada.

[17] The Commission also argues that there is an element of urgency when considering whether medical treatment is "readily or immediately available." The Claimant agrees that there has to be an element of urgency. But, they disagree over whether the Claimant's medical condition was urgent.

- **Element of urgency**

[18] The parties agree that there is an element of urgency to whether the medical treatment is readily or immediately available. But, I still have to determine whether this is in fact what the law demands.

[19] The Commission argues that whether medical treatment is "readily or immediately available" could vary, depending upon the urgency of the treatment that a claimant seeks. For instance, a claimant facing a rapidly deteriorating medical condition that could have fatal consequences if left untreated would require more timely medical treatment than a claimant who has a stable and relatively minor medical condition. So, "readily or immediately available" takes on a vastly different meaning, depending upon the circumstances that a claimant faces.

- **Appeal Division decisions on "readily or immediately available": C.P. and M.L.**

[20] The Commission relies on two Social Security Tribunal decisions: *C.P.*[3] and *M.L.*[4]

[21] In *C.P.*, the Appeal Division member there acknowledged that it is impossible to lay down any "hard and fast rule" as to what the words "immediately available" means in all cases. The member found that the words mean more than "within a reasonable time." The member found the words imply "prompt action."

[22] On its face, *M.L.* does not seem to help the Commission establish that there is an element of urgency when determining whether medical treatment is readily or immediately available.

[23] In *M.L.*, the Appeal Division dismissed the urgency of a claimant's condition as a factor in deciding whether medical treatment is readily or immediately available. The Appeal Division wrote, "The urgency of [a claimant's] condition is not relevant to the section 55(1)(a) test."[5]

[24] The General Division was correct in noting that section 55(1)(a) of the Regulations does not explicitly say whether a claimant requires immediate medical treatment. Indeed, medical treatment can be readily or immediately available, irrespective of whether a claimant needs urgent medical attention.

[25] There are no parameters other than length of time to assess whether medical treatment is readily or immediately available. But, surely, the Regulations contemplated that readily or immediately available would encompass something beyond a set length or timeframe by which treatment would be available.

[26] Otherwise, had the length of time been the sole measure as *M.L.* suggests, it would have been easy enough to include a time in the Regulations, such as a certain

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[3] See *Canada Employment Insurance Commission v C.P.*, 2019 SST 356.
[4] See *M.L. v Canada Employment Insurance Commission*, 2019 SST 452.
[5] See *M.L. v Canada Employment Insurance Commission*, 2019 SST 452 at para 21.

number of days, weeks, or possibly months, by which medical treatment would have to be available.

[27] The absence of any measures, guideposts, or context could lead to arbitrary and conflicting results as to what qualifies as readily or immediately available.

[28] For instance, in *C.P*. a 4-months wait for an MRI and a 5.5-months wait to se a specialist in Canada was considered readily or immediately available, whereas, here, the timeframe was for roughly half that. Yet, the General Division considered the shorter timeframe not readily or immediately available.

[29] In *C.P.*, by his own definition, the member determined that the available treatment was promptly available. Yet, why is 4 and 5.5 months considered readily or immediately available in one case, and 2.5 months not readily or immediately available in another case?

[30] It would be reasonable to expect that there are considerations outside length of time to determine whether medical treatment is readily or immediately available. After all, the words “readily or immediately available” are not precise and unequivocal.

[31] As the Commission argues, in deciding whether treatment is readily or immediately available, regard may be had to a claimant’s circumstances and perspective. For instance, a claimant who has a life-threatening medical condition may not find treatment readily or immediately available if they must wait a month for it. But, for another claimant, who has a minor and non life-threatening condition, that same length of time might be acceptable as being readily or immediately available.

[32] The Appeal Division member in *M.L.* cautioned against adopting this approach. The member wrote that the General Division should not be making value judgments as to the urgency of a claimant’s complaint for the purposes of determining whether, in the circumstances, the treatment is immediately available.[6]

[6] See *M.L. v Canada Employment Insurance Commission*, 2019 SST 452 at para 19.

[33] I agree with my colleague that the General Division should not make “value judgments.” But, in my view, that would only arise when there are no medical or other supporting records to show urgency.

[34] A decision-maker should examine any available medical records to assess a claimant’s need for urgent medical care. That will determine whether medical treatment is readily or immediately available.

[35] Ultimately, the Appeal Division in *M.L.* found that the claimant there had not established that the medical treatment she got overseas was not readily or immediately available in Canada. Her evidence of wait times for surgery was outdated and related to a condition that did not require urgent treatment at that time.

[36] Yet, although the member had early on ruled out urgency as a relevant consideration when determining whether treatment is readily or immediately available, the member looked at the medical evidence.

[37] If urgency had not been a consideration, there would have been no need for the member to examine the medical evidence. The member found that the medical evidence did not speak to the urgency of M.L.’s need for surgery or its availability in Canada. In other words, the member seemed to acknowledge that urgently needing medical care is a factor when determining whether treatment is readily or immediately available.

[38] In *C.P.*, the claimant C.P. had severe vertigo and dizziness. Her family doctor requested an MRI in July 2017. The earliest available date for an MRI was on November 15, 2017. An appointment with a vertigo specialist was booked for January 12, 2018. C.P. was unable to get an earlier appointment. She considered her condition too severe to wait. She left Canada in early October 2017, and travelled overseas where she was able to have an MRI on October 10, 2017.

[39] The Appeal Division determined that both the MRI and specialist appointment were readily or immediately available in Canada. The Appeal Division found that a medical note of October 3, 2017, did not support C.P.’s position that she had to leave

the country for immediate treatment and that she could not wait for the scheduled MRI in November. The note simply stated that C.P.'s symptoms were persistent and that, although she had a scheduled MRI, she was leaving Canada on an immediate basis to get the investigations and treatment.

[40] In *C.P.*, the Appeal Division considered whether C.P.'s condition required urgent care when it decided whether the medical treatment was readily or immediately available.

- **Realities of the medical system in Canada**

[41] Neither *C.P.* nor *M.L.* deals with whether "readily or immediately available" medical treatment must also take into account the realities of the medical system in Canada. The Commission has not referred to any authorities that suggest "readily or immediately available" must consider the realities of the Canadian medical system.

[42] Clearly, the Commission is arguing that some delays in treatment are expected in the Canadian medical system. And, for that reason, argues that "readily or immediately available" should reflect that reality.

[43] But, it is unclear how far "the realities of the Canadian medical system" should extend. For example, in some communities, it is commonplace for patients to wait a long time for certain medical treatments. That may well be a reality under the Canadian medical system. But, does that mean that treatment is readily or immediately available?

[44] Or, what about the case of a patient who secures treatment in half the usual time for a medical procedure. Even so, that treatment is still well into the future. But, because it is half the usual wait time, has that treatment then become readily or immediately available?

[45] In the matter before me, I do not see that there was any evidence at the General Division regarding the state of the medical system where the Claimant resides. If a decision-maker were to consider the "realities of the medical system," it would seem that there should be some evidence of the state of the medical system, other than

anecdotal evidence. After all, the availability of medical treatment may differ in communities across Canada.

[46] As this evidence was lacking before the General Division, I cannot conclude that the General Division necessarily made a legal error by failing to consider the medical realities of the Canadian medical health system, assuming that medical realities is part of the consideration.

[47] I am by no means concluding that what is readily or immediately available has to take into account the medical realities in Canada. I do not have to consider this issue, given the lack of evidence.

- **Conclusions on "readily or immediately available"**

[48] On a plain language reading of the section, the General Division's interpretation is sound. But, as I have indicated, this approach leads to uneven and oftentimes arbitrary results, as I have pointed out.

[49] For that reason, I agree with my colleagues on the Appeal Division that there must be an element of urgency when deciding whether medical treatment is "readily or immediately available." This involves examining the medical evidence and determining whether, from a medical perspective, a claimant should get treatment without undue delay.

[50] However, if urgency is part of the test for being readily or immediately available, this could be at odds with the situation where a claimant does not have any available medical treatment where they live. If a claimant's medical needs must always be urgent, this could disentitle those without urgent needs but who do not have available medical treatment where they live.

[51] Thus, it must be that the element of urgency arises only where medical treatment is available, but there is a question about whether that treatment is readily or immediately available.

[52] This means the General Division should have considered whether the Claimant's medical needs were urgent when it decided whether her medical treatment was readily or immediately available.

Remedy

[53] The General Division avoided considering the urgency of the Claimant's need for medical treatment.

[54] How can I fix this error? I have two basic choices.[7] I can substitute my own decision or I can refer the matter back to the General Division for reconsideration. If I substitute my own decision, this means I may make findings of fact.[8]

[55] I will give the decision that the General Division should have given. I have the necessary information to make a decision. The parties agree on the basic facts, though they disagree on how I should interpret those facts. Neither the Claimant nor the Commission has asked to return this matter to the General Division for a reconsideration.

[56] The Commission rejects the Claimant's assertions that her medical condition was so urgent that she could not wait until July 2021 for an MRI.

[57] The Commission says that the medical documentation gives no indication that the Claimant's health issues were life threatening and urgent. The Commission points to some of the medical records:

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[7] See section 59 of the *Department of Employment and Social Development Act*.
[8] See *Weatherley v Canada (Attorney General),* 2021 FCA 58, at paras 49 and 53, and *Nelson v Canada (Attorney General),* 2019 FCA 222, at para 17.

- 2 cystic lesions … "without suspicious signs"[9]

- "(…) with the appearance of a small 9 mm pseudo cyst, with no symptoms or repercussions, no necrosis, no focal lesions"[10]

- "mucinous neoplasms located in the head of the pancreas (…) without worrisome or suspicious signs of invasive carcinoma without dilatation of the main pancreatic duct, annual follow-up is recommended for 5 years initially, if they remain stable, follow-up period can be extended[11]

- "simple cyst versus bile duct (…) of the liver, benign findings, no follow up is necessary[12]

- "(two lesions (…) both in relation to papillary intraductal mucinous neoplasms of branched duct without worrying signs or invasive carcinoma"[13]

[58] The Claimant says that the medical evidence shows that her situation was critical and demanded timely investigations and treatment. She relies on the hepatobiliary surgeon's letter of November 5, 2021. He wrote:

> since pancreatic tumors have an uncertain biological behaviour, these cases are certainly a high priority to be evaluated with different types of studies in a timely manner since pancreatic tumors frequently have a high malignant neoproliferation, which I mentioned as "as soon as possible" in the first evaluation. At that time, only an abdominal scan had been performed, which showed the pancreatic lesion; however, further and more accurate image and histological evaluation were required to obtain a definitive diagnosis. In addition to the pancreatic injury, a pulmunar nodule was also demonstrated by a chest CT, which it made the pancreatic tumors more suspicious of malignancy. Therefore, further testing to determine a likely extra-abdominal extension became crucial. During her stay in Columbia, several studies were required and performed, which like any other medical Centre, it was necessary for her to have enough time to make appointments to be evaluated by different specialists such

[9] See biliopancreatic endosonography with puncture, signed by an adult gastroenterologist, dated June 8, 2011, at GD7-3 and GD7-22.
[10] See Analysis and Management Plan, following review of various diagnostic examinations, at GD7-6 and GD7-32.
[11] See MRI abdomen with contrast dated May 26, 2021, at GD7-7, GD7-19, and GD7-31.
[12] See MRI abdomen with contrast dated May 26, 2021, at GD7-7, GD7-19, and GD7-31.
[13] See MRI abdomen with contrast dated May 26, 2021, at GD7-18.

> as radiologist, gastroenterologist, endoscopic surgeon, pathologist and myself as a hepatobiliary surgeon.[14]

[59] The Commission argues that this report does not establish that the Claimant's medical condition was so urgent that she could not have waited until August 2021 for an MRI. The Commission says that the specialist's opinion is consistent with its arguments that the Claimant's medical condition, while serious, was not that so urgent that she could not have waited until August 2021 for an MRI.

[60] The Commission and the Claimant rely on records that were prepared after the Claimant already left Canada for medical treatment.

[61] However, the focus should be on the medical information that existed before the Claimant left Canada. That way, one can decide whether the Claimant urgently needed medical treatment and whether the medical treatment in Canada was readily or immediately available. However, subsequent records or reports may be required to clarify ambiguous or incomplete information, as long as they are consistent with the early records.

[62] The Claimant left Canada on May 21, 2021. The medical information that existed before she left Canada consists of the following:

- CT scan dated April 29, 2021[15] - the scan identified a nodule in the pancreatic head. The radiologist recommended further evaluation with an MRI.

- Medical report dated May 18, 2021, of hepatobiliary surgeon and clinical hepatologist[16]

[63] The specialist's May 18, 2021, report reads, in part as follows:

> [The Claimant] requires further image studies … Besides, it is necessary to achieve a histopathological assessment through a biopsy of the pancreatic mass with an endoscopic ultrasound. This will be useful as a Preoperative histological

[14] See letter dated November 5, 2021, of hepatobiliary surgeon, at GD5-2.
[15] See CT scan dated April 29, 2021, at GD2-8 to GD2-9.
[16] See specialist's report dated May 18, 2021, at GD2-14 to GD2-15.

> confirmation of this presumptive diagnosis in case of malignancy. Tumour biomarkers will also be necessary to be taken … The Patient complains of epigastric and mesogastric colic abdominal pain without constitutional symptoms. **Also, [the Claimant] has to be transferred to the hepatobiliary superspecialty as soon as possible to start her appropriate treatment**. The surgical treatment will be decided depending upon the classification of the histological pancreatic tumour. … it is required to determine the extraabdominal extension.The abdominal CT reports a calcified solitary solid pulmonary nodule in the right lung lower lobe, according to this report; it is suspicious of a calcified metastasis. Therefore, it requires an specific pulmonary nodule advanced study through a contrast multi-detector CT of solitary pulmonary nodules to better characterize this lesion. [*sic* throughout] (My emphasis)

[64] The specialist indicates that there was some urgency to the Claimant's medical condition. The Claimant complained of epigastric and mesogastric colic abdominal pain. The specialist wrote that the Claimant had to be transferred "as soon as possible to start her appropriate treatment", although the specialist had yet to determine what that treatment would be, as further tests, including an MRI and biopsy, were required.

[65] The Claimant's family doctor initially described the Claimant's decision to leave the country as a "personal decision."[17] The Commission argues that, if the family doctor thought the Claimant risked fatal consequences by waiting for an MRI, that she would have stated this.

[66] The Claimant later produced her family doctor's amended note. The doctor added that the Claimant's "hepatologist in Colombia told her to take immediate action."[18]

[67] I place little weight on the family doctor's notes. The doctor prepared the notes long after the Claimant had returned to Canada. Besides, the urgency described by the family doctor is based on the Claimant's reporting. The doctor did not offer her own opinion about the urgency of the Claimant's situation.

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[17] See family doctor's note dated September 14, 2021, at GD3-16.
[18] See family doctor's amended note dated September 14, 2021, at AD6-2. The Claimant states that she received her family doctor's amended note on November 8, 2021.

[68] There are no medical opinions that rebut the hepatobiliary surgeon's opinion that the Claimant required urgent investigations into her complaints.

[69] Given the specialist's May 18, 2021 opinion, I am satisfied that the Claimant required an urgent MRI to determine whether the lesions were malignant. As the specialist subsequently wrote in his letter of November 5, 2021, he considered the Claimant's type of case a "high priority," since "pancreatic tumours frequently have a high malignant neoproliferation."

[70] I am satisfied that the Claimant left Canada to undergo medical treatment that was not readily or immediately available where she lived in Canada.

[71] I am satisfied that the evidence establishes that the Clamant met the requirements of section 55(1)(a) of the Regulations, with regard to the MRI that the Claimant received on May 26, 2021 outside Canada.[19]

[72] There is also the issue over the additional medical treatment that the Claimant received outside Canada. The additional medical treatment delayed the Claimant's return to Canada. The Claimant returned to Canada on July 16, 2021.

[73] However, the Commission concedes that it was "not unreasonable for the General Division to consider all the consultations, investigations and treatments obtained by the [C]laimant as a whole, in the [C]laimant's specific circumstances."[20]

[74] The Commission further explains that it seems improbable that the Claimant could have obtained follow-up consultations, investigations and treatment in Canada simply by providing the results of the MRI that she had in Colombia.

[75] Had it not been for the Commission's concession on this point, I might have examined whether the additional medical treatment the Claimant received after she had

[19] Section 55(1)(a) of the Regulations also requires that the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada. The parties do not challenge whether the Claimant met this requirement.
[20] See Commission's representations, filed February 9, 2022, at AD3-7.

the MRI were of an urgent nature, and whether that treatment might have been readily or immediately available where the Claimant resides in Canada.

Conclusion

[76] The appeal is allowed in part. The General Division failed to consider whether the Claimant required urgent medical treatment. However, the outcome remains the same.

[77] The evidence shows that the Claimant required urgent medical treatment. The MRI that she had secured for August 5, 2021, was not readily or immediately available. The Claimant left Canada for the purpose of undergoing medical treatment at a hospital that was not readily or immediately available where she lived in Canada.

[78] The Claimant is not disentitled from receiving Employment Insurance benefits for the reason that she was outside Canada.

Janet Lew
Member, Appeal Division