



Citation: *JS v Canada Employment Insurance Commission*, 2024 SST 726

Social Security Tribunal of Canada Appeal Division

Decision

Appellant:	J. S.
Respondent:	Canada Employment Insurance Commission
Representative:	Adam Forsyth
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Decision under appeal:	General Division decision dated January 23, 2024 (GE-23-3342)
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Tribunal member:	Janet Lew
Type of hearing:	In person
Hearing date:	May 30, 2024
Hearing participants:	Appellant Respondent's representative
Decision date:	June 24, 2024
File number:	AD-24-156

Decision

[1] The appeal is dismissed. The General Division made a factual error, but it does not change the outcome.

Overview

[2] This is an appeal of the General Division's decision of January 23, 2024.

[3] The General Division found that the Appellant, J. S. (Claimant), did not file biweekly reports for his Employment Insurance claim on time. He asked to have his reports antedated (backdated), as if he had made them on time. But the General Division found that the Claimant did not have good cause for the delay in filing reports and, for that reason, it could not backdate his claims. This meant that the Claimant was disentitled from receiving Employment Insurance regular benefits from July 17, 2022, to May 31, 2023.¹

[4] Although the Claimant is looking for sickness benefits, he says at the same time that he in fact had good cause for the delay in filing his reports for regular benefits. The Claimant says that he had a severe head injury that left him unable to pursue his claim. He says that he had significant memory impairment and was largely unable to function. He argues that the General Division failed to appreciate this evidence.

[5] The Claimant argues that the General Division made an important factual error when it said that he had the capacity to pursue his Employment Insurance claim because he had yet to return to school.

[6] The General Division found that since the Claimant was out of school, that he did not have to deal with other matters and that he could focus his attention on his Employment Insurance claim. He says that the General Division failed to appreciate how

¹ The Claimant filed an application for regular benefits on July 17, 2022. He did not file reports after that date. On May 31, 2023, the Claimant asked the Canada Employment Insurance Commission to backdate his reports.

his head injury affected his cognitive abilities and memory, particularly in the timeframe before September 2, 2022.

[7] The Claimant asks the Appeal Division to give the decision he says the General Division should have given. He says the Appeal Division should find that he had good cause for the delay because of his cognitive issues. He says the Appeal Division should find that he was not disentitled from receiving regular benefits.

[8] The Respondent, the Canada Employment Insurance Commission (Commission) concedes that the General Division made a factual error when it found that the Claimant had the capacity to pursue his Employment Insurance claim when he was off school over the summer of 2022.

[9] However, the Commission argues that the evidence shows that the Claimant did not have good cause. The Commission says there is not enough supporting medical evidence to show that the Claimant remained unable to pursue his claim after he returned to school. The Commission notes the Claimant's evidence that his condition improved. The Commission also notes that there may be availability issues, although says that issue is beyond the scope of this appeal. The Commission asks the Appeal Division to dismiss the appeal.

Preliminary matters – the Claimant's request to convert his claim from regular to sickness benefits

[10] The Claimant states that he is actually seeking sickness benefits. In spring 2022, he had a major head injury that left him unable to work. Initially, he applied for regular benefits because he did not have the energy to book a medical appointment and get a medical note.²

[11] The Claimant later asked the Commission to convert his claim from regular to sickness benefits. The Commission needed a medical note, but the Claimant did not manage to get one on time before the Commission decided that he was not entitled to

² See Claimant's Request for Reconsideration, at GD 3-27.

regular benefits. The Commission did not convert his claim, nor consider whether the Claimant might have been eligible for sickness benefits.

[12] This appeal concerns only the claim for regular benefits. In the context of this appeal, the Appeal Division does not have any authority to consider the Claimant's entitlement to any sickness benefits.

Issues

[13] The issues in this appeal are as follows:

- a) Did the General Division base its decision on an erroneous finding of fact?
- b) If so, how should the error be fixed?

Analysis

[14] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.³

[15] For these types of factual errors, the General Division had to have based its decision on that error and had to have made the error in a perverse or capricious manner, or without regard for the evidence before it.⁴

The General Division made a factual error on the issue of the Claimant's capacity

[16] The General Division made a factual error when it stated that the Claimant had the capacity to deal with his Employment Insurance claim during the summer of 2022.⁵ The evidence simply did not support the General Division's findings that the Claimant had the capacity before September 2022 to pursue his Employment Insurance claim.

³ See section 58 (1) of the *Department of Employment and Social Development (DESD) Act*.

⁴ See section 58(1)(c) of the *DESD Act*.

⁵ See General Division decision, at para 31.

[17] The General Division focussed on the timeframe between July 19, 2022, and September 2, 2022.

[18] The General Division accepted that the Claimant had serious impairments caused by a concussion. The General Division also accepted that the Claimant's impairments had a major impact on his ability to attend to his studies starting in September 2022.

[19] However, the General Division found that the Claimant had the capacity to deal with Employment Insurance benefits between July 19, 2022, and September 2, 2022. The General Division found that the Claimant had the capacity because he was not going to school nor working during this time.

[20] The General Division rejected the notion that a reasonable person or a reasonable person in the Claimant's circumstances would have forgotten about Employment Insurance benefits from the time that they applied for benefits on July 19, 2022, until they returned to school in September 2022.

[21] However, the evidence paints a different picture of the Claimant's capacity.

[22] The Claimant had major headaches initially. A week after his injury in spring 2022, he saw an athletic director who referred him to either a doctor or chiropractor, though he does not recall all the details.⁶ He withdrew from all of his classes at the time, other than those that he was guaranteed to pass.

[23] The Claimant testified that in the first three months after his head injury, he could not remember friends' names. He also testified that it took him 20 minutes to write one paragraph for his social media feed so he could explain why he was not responding to friends. He found that exercise exhausting. He stated that that he did "absolutely nothing for three or four days after" writing one paragraph because his "brain was fried, head hurt. [His] functioning was very limited at that time."⁷

[24] The Claimant also testified that, in the first few months after the initial injury, he could barely function at all. He stated that his mental health and physical health were "pretty

⁶ At approximately 17:00 of the audio recording of the General Division hearing.

⁷ At approximately 54:30 to 55:30 of the audio recording of the General Division hearing.

bad.”⁸ He relied on his mother. He was unable to look after his own school registration. She helped him register for school.⁹ She also helped him with his Employment Insurance application.

[25] The Claimant’s symptoms started to improve over the summer. The Claimant testified that, even though there was improvement, he still had cognitive issues after returning to school in September 2022. He testified that he was incapable of learning or picking up anything new. He was able to complete assignments, write exams, and pass his schooling only because of his background and familiarity with the school material. He testified that he was largely not functioning. He testified that he was able to focus for about an hour a day “maybe” and attend most of one lecture, but he was mentally drained for most of the day.¹⁰

[26] It is clear from the Claimant’s testimony at the General Division hearing that he had very limited functioning throughout the summer of 2022. He testified that the symptoms from his head injury were worse in the spring and summer 2022 than they were in September 2022. The fact that he was not going to school or working during the summer 2022 did not mean that he had the capacity to pursue his claim. The General Division made a perverse and capricious finding when it determined otherwise.

Remedy

[27] Upon having found an error, the Appeal Division can either return the matter to the General Division for redetermination or it can give the decision that the General Division should have given. If the latter, this could mean that the outcome remains the same. The Appeal Division generally will give the decision that the General Division should have made if there is a sufficient evidentiary basis, even if the parties contest or dispute the evidence.

[28] I am going to give the decision that the General Division should have made. The evidence is uncontested. While there is an incomplete medical picture in that there are

⁸ At approximately 33:25 of the audio recording of the General Division hearing.

⁹ At approximately 46:15 of the audio recording of the General Division hearing. The Claimant testified that his mother helped him register for school.

¹⁰ Approximately 27:59 to 29:11 of the audio recording of the General Division hearing.

few medical records on file, there is no indication that the Claimant would be able to get more medical evidence. He did not seek out much medical treatment at the time. I will rely on the evidence that was before the General Division.

– **The General Division properly identified the requirements for backdating claims**

[29] The General Division properly stated the law and what the Claimant had to show to have his reports backdated as if he had made them on time. The Claimant had to show that he had good cause throughout the period of the delay.

[30] The General Division also noted that the Claimant had to show that he took reasonably prompt steps to understand his entitlement to benefits and obligations under the law. If he did not take these steps, then he had to show that there were exceptional circumstances that explained why he did not take these steps.¹¹

[31] The General Division also properly identified the period of the delay. The Claimant applied for regular benefits on July 9, 2022. The Claimant contacted the Commission on May 31, 2023, about his claim. The Claimant asked the Commission to backdate his claims to July 17, 2022.¹² So, the period of the delay was from July 17, 2022, to May 31, 2023.

– **The Claimant says he had exceptional circumstances for his delay in filing his reports**

[32] The Claimant says that he had exceptional circumstances to account for his delay. He had a head injury. He states that he continues to experience symptoms from the injury.

[33] The Claimant readily acknowledges that his condition improved over time and that he had the capacity to deal with his application sometime during the period of the delay. However, he argues that while his capacity improved, his memory did not. He says that he did not have any memory whatsoever of the application that he made for Employment

¹¹ See General Division decision at paras 10 to 13.

¹² The Claimant would like to have his application backdated to the time of his injury, but as that issue has only just arisen and never been considered previously, I do not have any authority to address that matter.

Insurance benefits. So, if he did not have any memory of having made an application, he argues that it was not unreasonable that he did not make enquiries of the Commission after September 2022. He says that he acted like a reasonable person in similar circumstances.

– **The Commission says the Claimant's capacity improved to the point he could have filed reports**

[34] The Commission says that the Claimant's actions after his return to school show that he had the capacity to take steps to understand his entitlement to benefits and obligations under the law.

[35] The Commission also says that, as the Claimant's mother helped him complete his Employment Insurance application form in July 2022, that it would have been reasonable if he sought her help again, regarding his application. The Commission says the Claimant should have sought her help; otherwise, he did not act reasonably.

– **There is insufficient medical evidence to support the Claimant**

[36] If, as the Claimant argues, the effects of the head injury erased any memory at all of the fact that he had applied for Employment Insurance benefits, and there was supporting medical evidence, I might have been inclined to accept that there were exceptional circumstances that explained all or part of the Claimant's delay.

[37] However, the evidence falls short of showing the severity of the Claimant's head injury. There is a medical note, but it does not say much about the Claimant's head injury, the extent of his memory loss, or whether any diagnostic or memory tests had been performed (or whether that would have been safe to perform).

[38] As it is, the medical note simply says that the Claimant had prolonged post concussion symptoms that included poor memory. The note also says that the Claimant has had numerous attempts at treatments and therapy, but there are no supporting details.

[39] This is not to suggest that the Claimant did not have a poor memory following the injury. But there is a distinction between having forgotten the memory, being reminded of it, and then recalling it from losing the memory for good and being unable to ever

recall it. The Claimant's testimony at the General Division hearing is not entirely clear, but it suggests that he had some underlying memory of his Employment Insurance application. The evidence suggests that he remembered the application after an unsuccessful job search and reminders from his mother.

[40] The medical evidence is not enough to show that the Claimant had exceptional circumstances throughout the period of the delay. So, he has not shown that he had good cause throughout the period of the delay.

– **The Claimant's injury likely would have affected his availability**

[41] Even if there was more supportive medical evidence that showed complete memory loss of the Claimant's application, and it reasonably showed that the Claimant had good cause for the delay, that would not establish entitlement to regular benefits.

[42] The Claimant would still have to prove that he was available for work. And yet the medical note clearly says that the Claimant "has been unemployable [because of his injury]."¹³ This evidence suggests that the Claimant would have difficulty showing that he was available for work. And, if he was unavailable for work, then he would not qualify for regular benefits.

[43] To be clear, I am not making any determination on the availability issue. That issue is not properly before me.

The Claimant's application for sickness benefits

[44] The Claimant wants to pursue his claim for sickness benefits. He also wants his claim backdated to when he got injured in spring 2022.

[45] The Commission has suggested that once this decision is released, the Claimant should immediately write to the Commission to ask it to convert his claim to sickness benefits, back to when he got injured.

¹³ See medical note at GD 3-43 (and GD 3-51).

[46] With the medical evidence now on file, the Commission can determine the Claimant's entitlement to sickness benefits. The Commission can also determine whether the Claimant had good delay for seeking to backdate the conversion of his claim to sickness benefits.

[47] The Claimant had been unable to pursue his claim for sickness benefits because by the time he was able to get a medical note from his doctor, the Commission had already gone ahead with deciding his application. After that, the Commission would not consider the claim for sickness benefits, as the Claimant had to go through the appeals process at the Social Security Tribunal.

[48] Once the Claimant gets this decision, he should immediately write to the Commission with his request to convert his claim to one for sickness benefits, going back to when his injury took place.

Conclusion

[49] The appeal is dismissed. The General Division made a factual error, but it does not change the outcome.

[50] The Claimant did not show that he had good cause for his delay throughout the period of delay to allow for backdating of his claims. And besides, the reason he cites (injury) would likely undermine his claim for regular Employment Insurance benefits because it suggests that he was not available for work.

[51] The Claimant should now immediately write to the Commission about his claim for sickness benefits.

Janet Lew
Member, Appeal Division