Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *J. B. v. Minister of Employment and Social Development,* 2016 SSTADIS 199

Tribunal File Number: AD-14-500

BETWEEN:

J. B.

Appellant

and

**Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

HEARD ON: May 11, 2016

DATE OF DECISION: June 3, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant	J. B.
Representatives for the Respondent	Sophine Johnson (Articling student)
	Hasan Junaid (Counsel – Observer only)

INTRODUCTION

[1] This is an appeal of the decision of the General Division (GD) of the Social Security Tribunal issued on August 12, 2014, which dismissed the Appellant's application for a disability pension on the basis that the Appellant did not prove that his disability was severe, for the purposes of the *Canada Pension Plan* (CPP), by his minimum qualifying period (MQP) of December 31, 2008. Leave to appeal was granted on May 26, 2015, on the grounds that the GD may have erred in rendering its decision.

OVERVIEW

[2] The Appellant submitted an application for CPP disability benefits in March 2011. He indicated that he was last employed at Walmart as a shelf stocker in February 2010, when he stopped working due to fatigue and pain in his shoulders and low back. He claims that he has been unable to work since then.

[3] In his CPP Questionnaire, the Appellant claimed numerous functional limitations, including an inability to sit or stand more than 30 minutes or walk more than 60-90 minutes. He said he could not lift or carry an object any distance, nor could he easily reach or bend. He was 44 years old at the time of his MQP and had a Grade 12 education, as well as ten months of post-secondary training in social work, which he received in 1995, although he was never employed in that field. He had previously worked as a veneer puller but stopped because of tendonitis and an avulsion fracture of his right radius. From 2000 to 2005, he had part-time jobs as a rink attendant and a labourer at a cement block manufacturer, which ceased following a workplace injury that led to the amputation of his left middle finger. He has seen and treated by numerous specialists but has not had any appreciable improvement in pain or functionality.

[4] At the hearing before the GD in July 2014, the Appellant testified about his schooling and work experience. He also testified about his injuries and the treatment he has undergone. He testified that, despite physiotherapy and treatment, there was no improvement in his pain or energy levels. He said that, while his family physician prescribed Seroquel and Naproxen, he had never filled those prescriptions, nor had he accepted the drug recommendations of his pain specialist for fear of becoming dependent. He relied on over-the-counter pain medication and Tylenol #3 as needed.

[5] In its decision dated August 12, 2014, the GD found that the Appellant had the capacity to work within his restrictions. It also found that he had the capacity to retrain but had not made sufficient effort to investigate alternative occupations, nor had he pursued all available treatment options.

[6] On or about September 11, 2014, the Appellant filed an Application for Leave to Appeal with the Appeal Division (AD) of the Social Security Tribunal alleging numerous errors on the part of the GD. On May 26, 2015, following a period of abeyance, granted at the request of the Appellant's then-representative, the AD granted leave on the grounds that the GD may have made the following errors:

(a) It erred in law by failing to apply the *Villani*[1] "real world" factors in assessing the severity of the Appellant's disability.

(b) It erred in finding that the Appellant had failed to mitigate his impairments by not trying other medications, despite the fact that they had not been prescribed.

[7] The AD scheduled a hearing of the appeal for May 11, 2016 by way of videoconference for the following reasons:

(a) The complexity of the issues under appeal;

(b) The fact that the Appellant or other parties were represented;

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[1] *Villani v. Canada (A.G.)*, 2001 FCA 248

(c) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[8] The Appellant's submissions were set out in his Application for Leave to Appeal and Notice of Appeal of September 11, 2014. Further submissions were made on March 18, 2015. The Respondent made submissions on July 10, 2015 and amended them on March 17, 2016.

[9] In a letter dated December 15, 2015, the Appellant's representative requested the AD to delay the hearing until the Spring of 2016, by which time he would have secured a representative able to address the questions put forth in paragraph 34 of the Leave to Appeal decision.

[10] In an email dated April 27, 2016, the Appellant's representative advised the AD that neither she nor her client were able to argue complex issues such as the degree of deference owed to the GD. She found the quantity of paperwork submitted by the Respondent overwhelming and suggested that the matter merely be sent back to the GD for reconsideration. She had attempted to find a lawyer who was willing to take the file on a pro bono basis but was unsuccessful.

[11] On May 6, 2016, the Appellant's representative advised the AD that she would not be in attendance at the hearing, as she was not able or qualified to discuss matters that were raised in the Leave decision and discussed in more than 600 pages of Minister's submissions.

[12] On May 11, 2016, as the hearing convened, the Appellant confirmed that his representative had withdrawn from the file two weeks earlier.

THE LAW

[13] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) the only grounds of appeal are that:

(a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The GD based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

STANDARD OF REVIEW

[14] Until recently, it was accepted that appeals to the AD were governed by the standards of review set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*[2]. In matters involving alleged errors of law or failure to observe principles of natural justice, the applicable standard was held to be correctness, reflecting a lower threshold of deference deemed to be owed to an administrative tribunal often analogized with a trial court. In matters where erroneous findings of fact were alleged, the standard was held to be reasonableness, reflecting a reluctance to interfere with findings of the body tasked with hearing factual evidence.

[15] The Federal Court of Appeal decision, *Canada (MCI) v. Huruglica*[3], has rejected this approach, holding that administrative tribunals should not use standards of review that were designed to be applied by appellate courts. Instead, administrative tribunals must look first to their home statutes for guidance in determining their role.

ISSUES

[16] The issues before me are as follows:

(a) What standard of review, if any, applies when reviewing decisions of the GD?

(b) Did the GD err in law by failing to apply the *Villani* "real world" factors in assessing the severity of the Appellant's disability?

(c) Did the GD err in finding that the Appellant had failed to mitigate his impairments by not trying other medications, despite the fact that they had not been prescribed?

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[2] *Dunsmuir v. New Brunswick,* [2008] SCR 190, 2008 SCC 9
[3] *Canada (Minister of Citizenship and Immigration) v. Huruglica,* 2016 FCA 93

SUBMISSIONS

(a) Standard of Review

[17] The Appellant made no submissions on the appropriate standard of review or the level of deference owed by the AD to determinations made by the GD.

[18] The Respondent's amended submissions on this issue were made prior to *Huruglica*, which was released on March 29, 2016. The submissions discussed in comprehensive detail the standards of review and their applicability to this appeal, concluding that a standard correctness was to be applied to errors of law, and reasonableness was to be applied to errors of fact and mixed fact and law.

(b) Whether the GD Erred in Applying Villani

[19] The Appellant submits that the GD erred in finding that he had the capacity to retrain in another occupation based on the fact that he completed social work courses in 1995. At the leave to appeal stage, the AD found that there was an evidentiary basis indicating the Appellant had capacity to retrain, subject to medical restrictions, and concluded this ground carried no reasonable chance of success. However, the AD did see a possible error of law in how the GD applied the *Villani* factors when it stated in paragraph 26 in its reasons for decision:

> The Tribunal finds that these factors do not apply in this case to restrict the Appellant's capacity to work and it is strictly the Appellant's medical conditions that affect his ability to work.

Neither the Appellant nor his former representative made further submissions on this ground.

[20] The Respondent submits that the GD was reasonable in its interpretation of *Villani*, despite its somewhat unfortunate use of words. The Respondent argues that reading the entire decision makes it clear the GD was alive to the *Villani* factors, even if it concluded they did not assist the Appellant in meeting the eligibility standard for CPP disability benefits.

[21] Furthermore, the Respondent submits that, even if the GD erred in applying the *Villani* factors, the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v.*

Newfoundland and Labrador[4] permits the AD to "go behind the reasons" for the purpose of assessing the reasonableness of the outcome. Whether or not the GD's reasons contain a convincing rationale for its decision, the fact remains that the Appellant had no *Villani* factors that would assist him in qualifying for CPP disability benefits. A reviewing court may look to the record for the purpose of assessing the reasonableness of the outcome.

(c)) Whether GD Erred in Finding the Appellant Failed to Follow Recommended Treatment

[22] The Appellant submits that the GD erred in finding that the Applicant had failed to mitigate his situation when he did not try other medications, despite the fact that they had not been prescribed. In its decision, the GD wrote that it was unreasonable for the Applicant to refuse treatment with any prescription medication, further noting at paragraph 29:

> It is generally known that there are many different antidepressants available for treatment of both PTSD and chronic pain each with varying degrees of side effects. It is also generally known that not all pain medication is addictive and there are many available specifically for chronic pain and neuropathic pain.

[23] The Appellant argues that the denial was incorrect because it was:

> …based on the erroneous assumption that he would have capacity to work if he took medication. Neither the family doctor or chronic pain specialist has prescribed the Appellant pain medication that is not addictive, so stating that there are many available to the Appellant should be irrelevant to this particular conclusion… He is being denied because there are medications available but were not prescribed to him therefore he did not mitigate? Further, he is taking medication that is not addictive – Ibuprofen for pain control.

[24] The Respondent submits that the passage from paragraph 29 had to be read in context, as it included an extended discussion on the jurisprudence on mitigation, the treatments recommended by the Appellant's physicians and an assessment of whether his reluctance to take pain medications was reasonable under the circumstances. Ultimately, GD's decision came down to the fact that the Appellant's treatment providers made specific recommendations, which the Appellant declined to follow. In doing so, he failed to mitigate his situation by not pursuing all reasonable treatment options.

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[4] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62

ANALYSIS

(a) Standard of Review

[25] Although *Huruglica* deals with a decision that emanated from the Immigration and Refugee Board, it has implications for other administrative tribunals. In this case, the Federal Court of Appeal held that it was inappropriate to import the principles of judicial review, as set out in *Dunsmuir*, to administrative forums, as the latter may reflect legislative priorities other than the constitutional imperative of preserving the rule of law. "One should not simply assume that what was deemed to be the best policy for appellate courts also applies to specific administrative appeal bodies."

[26] This premise leads the Court to a determination of the appropriate test that flows entirely from an administrative tribunal's governing statute:

> … the determination of the role of a specialized administrative appeal body is purely and essentially a question of statutory interpretation, because the legislator can design any type of multilevel administrative framework to fit any particular context. An exercise of statutory interpretation requires an analysis of the words of the IRPA [*Immigration and Refugee Protection Act*] and its object… The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the IRPA and the role of the RAD [Refugee Appeal Division].

[27] The implication here is that the standards of reasonableness or correctness will not apply unless those words or their variants are specifically contained in the founding legislation. Applying this approach to the DESDA, one notes that paragraphs 58(1)(a) and (b) do not qualify errors of law or breaches of natural justice, suggesting the AD should afford no deference to the GD's interpretations.

[28] The word "unreasonable" is nowhere to be found in paragraph 58(1)(c), which deals with erroneous findings of fact. Instead, the test contains the qualifiers "perverse or capricious" or "without regard for the material before it." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the AD should intervene when the GD bases its decision on an error that is clearly egregious or at odds with the record.

(b) Villani Test

[29] In *Villani,* the Federal Court of Appeal held that the test for disability must be applied in a "real world" context considering factors such as age, experience, level of education, language proficiency and capacity for retraining. Merely citing case law is insufficient; as was held by *Lalonde v. Canada*,[5] a tribunal must actually analyze what impact a claimant's profile will have on his or her ability to pursue regularly a substantially gainful occupation.

[30] In this case, the GD referred to the Appellant's background early in the decision, noting he was 44 years old at the time of the MQP with a high school education and a native speaker's command of English. In its analysis, the GD correctly summarized *Villani* and devoted an entire paragraph (36) to discussing what impact the Appellant's personal characteristics, in tandem with his claimed impairments, were likely to have on his employability. The GD acknowledged that his vocational experience was confined to manual labour but concluded that he was a suitable candidate for retraining, as he had already demonstrated an inclination and capacity for it as an adult when he completed ten months of social work courses in the mid-1990s.

[31] Arguable grounds of appeal were raised by the GD's "unfortunate wording" (as the Respondent put it) in summing up this issue. In declaring so categorically that the *Villani* factors "do not apply," the GD invited scrutiny of its analysis. That said, I agree with the Respondent that the GD did not intend to simply dismiss the relevance of *Villani* to the Appellant's claim but was instead making the point that his personal characteristics presented no real obstacle to his employability.

[32] My review of the entire decision indicates that the GD did not merely cite *Villani* and list the Appellant's personal characteristics, but actively assessed how they would affect his ability to retrain or maintain employment. It cannot be said that the GD was blind or insufficiently attentive to the "real world" test.

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[5] *Lalonde v. Canada (MHRD),* 2002 FCA 211

(c)) Mitigation

[33] The GD cited *Lalonde* in stating that a claimant must mitigate his or her impairments by pursuing all recommended treatment options. Having read *Lalonde*, I am not sure if it stands as an exemplar for this proposition, although many other cases[6] have imposed an obligation on CPP disability claimants to follow reasonable medical advice.

[34] The GD then referred to specific instances in the medical record that documented the Appellant's failure to follow medical advice, including his rejection of Dr. Reid's recommendation that he take Gabapentin, a tricyclic antidepressant and regular doses of anti-inflammatories and Dr. Behren's recommendation of Seroquel and Naproxen. In his testimony before the GD, the Appellant confirmed his reluctance to take prescribed medication, stating that he preferred to manage his pain with Advil and the occasional Tylenol #3 because he did not want to mask his symptoms and feared developing drug dependencies.

[35] In his testimony, the Appellant cited not only fear of dependency but also cost and side effects (feeling "vague, foggy and buzzed") among his reasons for not taking prescribed medications. He had attempted to manage his pain by using alternative treatment options and attending chronic pain support groups and mental health counseling, but refusing to take medications was a personal choice that he viewed as reasonable.

[36] However, having applied for CPP disability benefits, the Appellant must permit others to judge his actions. In this forum, the question of whether refusal of a treatment is reasonable or not is for the trier of fact. The GD correctly cited the relevant legal principle governing the issue of medical mitigation. It then assessed the evidence to establish certain facts surrounding the Appellant's refusal to take prescribed medication. The question now is whether the GD applied the law to those facts fairly.

[37] In paragraph 29, the GD found it was unreasonable of the Appellant to refuse prescribed medicines and proceeded to explain why. It was "generally known" that there are many antidepressants available for treatment of PTSD and chronic pain, each with varying side

[6] *Giannaros v. Canada (MSD),* 2005 FCA 187; *Kaminski v. Canada (Social Development)*, 2008 FCA 225 and *Warren v. Canada (A.G.),* 2008 FCA 377.

effects. It was also “generally known” that not all pain medications are addictive and many are available specifically for chronic and neuropathic pain. It appears the Appellant felt the GD was overreaching in taking judicial notice that there exist pain medications that can be both effective and non-addictive. However, as there was no evidence on file to suggest otherwise, I find the GD did not err in making this admittedly broad pronouncement. I also note that the Appellant suggests in his Notice of Appeal that all of the pain medications prescribed by his treatment providers are potentially addictive, yet nowhere during this proceeding has he ever introduced evidence that either Gabapentin or Naproxen (or Seroquel, an antidepressant he also refused) are in fact addictive. Oddly enough, the Appellant admitted to occasionally taking Tylenol #3, a powerful, narcotic-based painkiller that I note is widely thought to foster dependency.

[38] Whatever his motivations for doing so, the fact remains that the Appellant made a conscious decision to disregard selected medical recommendations—as documented in several of the medical reports, confirmed by the Appellant in his testimony and admitted in his Notice of Appeal. In doing so, he was in effect second-guessing the professional opinions of his treatment providers, who are trained in pain management techniques and who presumably would not have prescribed medications unless: (i) they were likely to produce some measure of relief and an increase in functionality and (ii) their positive effects outweighed their side effects, including addiction risk.

[39] In the Notice of Appeal, the Appellant’s representative criticized the GD for faulting his failure to try other medications, despite the fact they had not been prescribed. “He is being denied because there are medications available but were not prescribed to him therefore he did not mitigate?” With respect, I think this distorts the GD’s point. When the GD said “it is generally known” that there are effective medications for PTSD and chronic pain that are not necessarily addictive, it was not speaking of hypothetical drugs but of specific medications (Gabapentin, Naproxen and Seroquel) that had in fact been prescribed to, and refused by, the Appellant. In the ordinary course of treatment, it is not uncommon for a clinician to place a patient on successive trials of medications, observing the response to each while adjusting doses. Those that have no effect or result in unwanted side effects may be discontinued in favour of the next alternative, and so on, until the optimal combination of drugs and dosage is attained. Of course, none of this process of trial and error can work if the patient refuses to

participate. While it may expose the patient to potential discomfort and uncertainty, the process is designed to be temporary with the promise of a net benefit in the end.

[40] For these reasons, the GD was justified in finding the Appellant's refusal to take certain medications was unreasonable, and it was thus within its authority to draw an adverse inference from that refusal.

CONCLUSION

[41] The Appellant has not demonstrated to me that the GD committed an error of fact or law on either of the claimed grounds. The appeal is therefore dismissed.

Member, Appeal Division