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

Citation: *K. J. v. Minister of Employment and Social Development*, 2016 SSTADIS 217

Tribunal File Number: AD-15-357

BETWEEN:

K. J.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: June 17, 2016

REASONS AND DECISION

DECISION

[1] The appeal is denied.

INTRODUCTION

[2] This is an appeal of a decision of the General Division (GD) of the Social Security Tribunal, which dismissed the Appellant's application for a disability pension on the basis that the Appellant did not prove that her disability was severe, for the purposes of the *Canada Pension Plan* (CPP), by her minimum qualifying period (MQP) of December 31, 2010. Leave to appeal was granted on September 22, 2015, on the grounds that the GD may have erred in rendering its decision.

OVERVIEW

[3] The Appellant submitted an application for CPP disability benefits in September 2010. She indicated that she was employed as a personal support worker in a nursing home until July 2008, when a series of work-related back injuries forced her to leave her job. She claims that she has been unable to work since then.

[4] At the hearing before the GD in February 2015, the Appellant testified about her schooling and work history. She also gave evidence about her injuries and the treatment she has received. She told the GD that, despite physiotherapy and medications, there has been no improvement in her pain and her mental condition is a "mess."

[5] In its decision dated March 11, 2015, the GD found that the Appellant had the capacity to work within restrictions. It also found that she had not mitigated her impairments by making sufficient effort to investigate alternative occupations.

[6] On June 11, 2015, 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 September 22, 2015, the AD granted leave on the sole ground that the GD may

have erred in law by applying the incorrect standard of proof when it wrote that it was left with "some doubt" as to the severity of the Appellant's symptoms. On April 8, 2016, the AD decided that an oral hearing was unnecessary and the appeal would proceed on the basis of the documentary record for the following reasons:

(a) There were no gaps in the file or need for clarification;

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

[7] The Appellant's submissions were set out in her Application for Leave to Appeal and Notice of Appeal. Her representative made further submissions on November 6, 2015. The Respondent's submissions were also filed on November 6, 2015.

THE LAW

[8] 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

[9] 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*[1]. 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

[1] *Dunsmuir v. New Brunswick*, [2008] SCR 190, 2008 SCC 9

owed to a first level administrative tribunal. 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.

[10] The Federal Court of Appeal decision, *Canada (MCI) v. Huruglica*[2], 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

[11] The issues before me are as follows:

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

(b) Did the GD err in law by imposing an inappropriately high burden of proof on the Appellant?

(c) If the GD is found to have erred, what are the appropriate remedies?

SUBMISSIONS

(a) What standard of review should be used?

[12] Both the Appellant's and Respondent's submissions on this issue were made prior to *Huruglica*, which was released on March 29, 2016.

[13] The Appellant invoked *Dunsmuir* in submitting that for questions of law relating to the interpretation of the tribunal's own statute, the appropriate standard of review is reasonableness. For questions of fact and questions of mixed fact and law, the standard of review is correctness. In this case, the nature of the question is whether the correct application of the standard of proof was applied and this question is outside of the Social Security Tribunal's legislation and specifically, the application of the correct legal test based upon the civil standard of proof, which is on a balance of probabilities. According *Dunsmuir*, the standard of review of the GD

[2] *Canada (Minister of Citizenship and Immigration) v. Huruglica*, 2016 FCA 93

decision is correctness: As a result, it was incorrect for the GD to apply an elevated standard requiring the removal of all doubt.

[14] The Respondent's 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. In this case, the sole issue is whether the GD may have erred in law in requiring the Appellant to meet a higher standard of proof than the balance of probabilities. The Respondent submits that this is a question of law and the correctness standard applies.

(b) Did the GD err in law by applying the incorrect standard of proof?

[15] The Appellant submits that the GD made an error in law when it wrote at paragraph 33 of its decision:

> While the Tribunal noted the significant health concerns facing the Appellant, it was also noted that the medical evidence on file leaves some doubt as to the severity of her symptoms as of the MQP.

[16] The Appellant submits that the words "some doubt" imply that she was held to a stricter burden of proof than the standard applicable in all civil proceedings. In establishing facts, the civil standard of proof—"on a balance of probabilities"— is the only appropriate means by which to measure evidence. This means the Appellant must show that it was more probable than not that she was disabled in accordance with the CPP. Requiring the Appellant to prove her case by removing "some" doubt effectively elevates the standard of proof of to the "beyond reasonable doubt" test demanded in criminal proceedings. The Appellant relied on the Supreme Court of Canada case *of F.H. v. McDougall,*[3] which determined that the failure of a trial judge to apply the correct standard of proof in assessing evidence constituted an error of law. Such a failure may be manifested in an express misstatement of the standard of proof, in which case it will be presumed that the incorrect standard was applied. Alternatively, where the trial judge expressly states the correct standard of proof, or is silent on the matter, it will be presumed that the correct standard was applied.

[3] *F.H. v. McDougall,* [2008] 3 SCR 41, 2008 SCC 53 (CanLII)

[17] In this case, while the GD correctly stated the standard of proof at the beginning of its decision, it later stated that there could be no doubt as to the severity of her symptoms. Moreover, a review of how the evidence was actually scrutinized and weighed indicates the incorrect standard was applied. The fact that the GD initially stated the standard correctly did not cure the defects in its decision.

[18] The Respondent submits that The GD identified the correct standard of proof at paragraphs 9, 29 and 34 of its decision, stating that it had to "decide if it is more likely than not" that the Appellant's disability was severe and prolonged, that the Appellant had to "prove on a balance of probabilities" that she had a severe and prolonged disability and that it was not satisfied "on the balance of probabilities" that the Appellant's disability was severe.

[19] The GD was clearly alive to the correct standard of proof, but it also applied it in practice. While the language used in paragraph 33 was unfortunate, the rest of the GD's decision does not indicate that it applied an unduly onerous standard of proof. At paragraphs 30- 37, the GD analyzed the evidence that both supported and did not support a conclusion that the Appellant's disability was severe at MQP. The GD also cited relevant case law. It specifically noted at paragraph 34 that it considered "the totality of the evidence and the cumulative effect of the Appellant's medical conditions."

(c) What are the appropriate remedies?

[20] Acknowledging the range of remedial powers conferred on the AD by section 59 of the DESDA, the Appellant asks that the decision be rescinded and the matter referred back to the GD for reconsideration.

[21] The Respondent asks that the decision of the GD be confirmed.

ANALYSIS

(a) Standard of Review

[22] 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.”

[23] 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].

[24] 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.

[25] 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) Standard of Proof

[26] The Respondent correctly notes that the test for disability under the CPP is difficult to meet. In order to prove a severe and prolonged disability, claimants must demonstrate more than just an inability to perform their former jobs—they must also show that they cannot engage in “substantially gainful employment.” In making this point, however, the Respondent appears to be mistaking the stringency expressed in the wording of paragraph 42(2)(a) with a higher standard of proof. In fact, the evidentiary threshold for meeting the CPP test for disability

remains on a balance of probabilities—the Appellant must show "more likely than not" that her disability is severe and prolonged.

[27] That said, the Respondent has persuaded me that the correct standard was in fact applied. The Appellant alleges that in addressing the medical evidence before it, the GD erred in applying a stricter standard of proof when it indicated in paragraph 33 that it was left with "some doubt" as to the severity of the Applicant's symptoms. I agree that on its face this construction misstates the standard of proof, yet it is also true that the GD's decision correctly stated it on at least three other occasions:

(a) In paragraph 9, it wrote, "The Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP."

(b) In paragraph 29, it wrote, "The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2010."

(c) In paragraph 34, it wrote, "Having considered the totality of the evidence and the cumulative effect of the Appellant's medical conditions, the Tribunal is not satisfied on the balance of probabilities that the Appellant suffers from a severe disability."

[28] The GD correctly stated the standard of proof more often than it did not, a fact lends credence to the Respondent's position that the words "some doubt" were a mere lapse. I agree that use of this expression amounted to no more than an "unfortunate slip," especially in the context of the entire decision, in which it is clear that that the GD was cognizant of the correct standard, actively analyzing the evidence, weighing the Appellant's submissions against the Respondent's and considering both the strengths and weakness of their respective cases. I saw no indication that the GD rejected the Appellant's claim on the basis of "some" doubt but rather applied the correct standard by finding a preponderance of doubt.

(c) Remedy

[29] As I have found that the GD in effect applied the law correctly, I am confirming its decision.

CONCLUSION

[30] The appeal is therefore dismissed.

Member, Appeal Division