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

Citation: *W. T. v. Minister of Employment and Social Development*, 2016 SSTADIS 245

Tribunal File Number: AD-15-33

BETWEEN:

W. T.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: June 30, 2016

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

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 he did not prove that his disability was severe, for the purposes of the *Canada Pension Plan* (CPP), as of his minimum qualifying period (MQP). Leave to appeal was granted on the grounds that the GD may have failed to observe a principle of natural justice by refusing to admit additional documentation upon which the Appellant wished to rely.

OVERVIEW

[3] The Appellant submitted an application for CPP disability benefits in September 2010. He indicated that he worked in the construction industry for many years and later became a spiritual advisor on contract with Correctional Services Canada. He said he had not worked since June 2009, when back pain and joint inflammation made it impossible for him to carry out his duties.

[4] The Appellant applied for CPP disability benefits in September 2010 and was refused initially and on reconsideration by the Respondent on the basis that he did not suffer from a disability that prevented him regularly from pursuing any substantially gainful employment, as required under the provisions of paragraph 42(2)(a) of the CPP. He appealed to the Office of the Commissioner of Review Tribunals (OCRT) in November 2011 and a hearing was scheduled before a three-member panel of the CPP Review Tribunal on September 12, 2012. That hearing was adjourned pending further information from the Canada Revenue Agency (CRA) about the Appellant's earnings and clarification about the Respondent's use of certain codes in its internal assessment documents.

[5] On April 1, 2013, pursuant to the *Jobs, Growth and Long-term Prosperity Act*, the appeal was transferred from the OCRT to the General Division of the Social Security Tribunal.

[6] At the hearing before the GD on November 25, 2014, the Appellant testified about his education and work history. He also gave evidence about his injuries and the treatment he has received. He told the GD that, despite surgery, physiotherapy and medication, there had been no improvement in his pain since the end of his MQP of December 31, 2006. He regarded his employment after that date as a failed work trial.

[7] In its decision dated December 17, 2014, the GD found that the Appellant could not work for a period of time after his December 2000 back surgery, but earnings in 2001-03 demonstrated he regained his capacity to work. There was a "troubling" lack of medical evidence from 2001- 06, and he registered substantially gainful earnings in 2008-09, well after the end of his eligibility period. In the end, the GD was not satisfied, on the balance of probabilities, that the Appellant had a severe disability as of the MQP date.

[8] On January 23, 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. The AD posed a series of written questions to the Appellant, who responded in a lengthy submission dated February 24, 2015. On June 2, 2015, the AD granted leave on the sole ground that the GD may have breached a principle of natural justice by refusing a request by the Appellant's representative (Representative) to accept additional documentation at the hearing. At that time, the AD invited further submissions on the matter.

[9] On July 15, 2015, the Representative filed written submissions. The Respondent made its submissions on July 24, 2015.

[10] On April 8, 2016, the AD decided that an oral hearing was unnecessary 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.

[11] Instead, the AD decided that the appeal was best conducted by written questions and answers. It posed the following questions to the Appellant:

(a) How did the GD's refusal to admit the Representative's written submissions breach a principle of natural justice? Support your position with applicable case law, if any.

(b) How do the written submissions support your claim that the MQP was incorrectly determined?

(c) Are there other issues addressed in the written submissions that were not adequately explored at the hearing because the GD refused to admit them? If so, which issues? Had the GD admitted the written submissions, would consideration of these issues have materially impacted its eventual determination?

[12] The Appellant and his Representative replied by way of a letter dated April 27, 2016.

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*[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 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.

[15] 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

[16] The issues before me are as follows:

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

(b) Did the GD fail to observe a principle of natural justice by refusing to accept the Representative's written submissions during the hearing?

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

SUBMISSIONS

(a) What standard of review should be used?

[17] In its submissions, the Appellant's Representative did not address standards of review. The Respondent's submissions on this issue were made prior to *Huruglica*, which was released on March 29, 2016.

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

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

[18] 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 breach natural justice by refusing to admit proffered documents?

[19] The Appellant and his Representative submit that the GD ought to have accepted documents which they attempted to file at the hearing. The Representative alleges that she is more effective when she can read and refer to documents when making oral submissions, particularly as she has been diagnosed with a learning disability. The Appellant claims that he was "thrown off" after the GD ruled his written submissions were inadmissible, and his ability to focus—already impaired by chronic pain and prescription medications—was diminished further.

[20] The Representative also alleges that the issue of whether to admit the documents was discussed at some length at the beginning of the hearing, but the GD member did not turn on her recording device until later. As a result, a significant portion of the proceedings was not recorded, including any submissions which she may have made regarding the admissibility of the documents.

[21] As a result of the GD's refusal to admit the documents, the Appellant submits he was unfairly denied the opportunity to fully present his case in two significant ways:

(a) The GD did not consider material information on International Classification of Disease (ICD) coding, a system used by medical practitioners to assess disability severity.

(b) During introductory remarks, the GD member deemed the MQP to be December 31, 2006, a date disputed by the Appellant and his Representative. They wanted to argue that this determination was wrong, as the Appellant recorded earnings in 2007, 2008 and 2009 (as confirmed by CRA assessments in the latter two years),

but the GD member did not permit submissions on the matter. The Appellant alleges that this exchange also went undocumented because it occurred prior to activation of the hearing recorder.

[22] The Appellant also submits that his appeal has been forced to follow a process that is unfair and contrary to the principles of natural justice. He already submitted his entire case before a three-person panel in September 2012 in a hearing that was adjourned to permit further submissions on ICD and additional earnings reported as a result of a CRA audit. The Appellant alleges he was never told at the first hearing that the forum and format were subject to change. After a long wait, the hearing was reconvened for a *de novo* hearing before a single GD member who lacked the collective knowledge, expertise and training of the former panel.

[23] The Respondent submits that the GD did not breach natural justice in refusing to accept the 40-page written submissions as evidence, given that these submissions are not evidence, as already found by the AD in its Leave to Appeal decision. Rather than written submissions, they are better characterized as speaking points, which the Representative prepared to help her in making oral arguments. Furthermore, the Appellant has not alleged that he was denied the opportunity to make any oral submissions he wished to make during the hearing. The GD cannot be faulted if the Representative declined to present all of the arguments contained in her speaking points.

[24] The Respondent also submits that there is no evidence that the Representative raised any fairness issues at the GD hearing or otherwise objected to the GD member refusing to accept the speaking points as evidence. The Appellant is thus precluded from raising this ground for the first time on appeal since this is considered to be an implied waiver of any perceived breaches. It is settled law that a breach of natural justice must be brought up at the earliest practicable opportunity. If no objection as to an alleged breach of procedural fairness is made at the hearing, then the party alleging the breach is taken to have provided an implied waiver of any perceived breach or unfairness.[3]

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[3] *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 391; *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, leave to appeal to the Supreme Court of Canada dismissed: [2001] S.C.C.A. No. 435

[25] Finally, the GD found, and the AD confirmed, that the Appellant was working at a substantially gainful occupation post-MQP. This finding renders this appeal moot as a claimant cannot be working at a substantially gainful occupation and be entitled to a CPP disability pension at the same time. In the Appellant's case, his MQP is December 2006, yet he started a business providing spiritual guidance in February 2007 and worked for Correctional Services Canada from April 2007 until July 2009, when he stopped work due to illness.

(c) What are the appropriate remedies?

[26] The Appellant asks the AD to rescind the GD's decision and award him a CPP disability pension. The Respondent asks that the GD's decision be confirmed.

ANALYSIS

(a) Standard of Review

[27] 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."

[28] 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].

[29] 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.

[30] 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) Refusal of Documents

[31] The focus of this appeal is the GD's alleged refusal to accept the package of documents that the Appellant and his representative attempted to submit either before or during the in-person hearing of November 25, 2014. The package, catalogued as AD1A, consists of what appears to be a 40-page typewritten script and a four-page document entitled "ICD-9 Codes for Family Medicine 2011-12: The FPM Long List." As noted in the Leave to Appeal decision, the Representative's script, which contains the Representative's argument and summaries of some of the medical records, does not qualify as evidence and is better described as containing arguments. The ICD codes were previously submitted on September 30, 2013 and were available to both the CPP Review Tribunal and the GD prior to their respective hearings.

[32] I have reviewed in detail the recording of the November 25, 2014 hearing before the GD. I did not hear in it any indication that the Appellant or his Representative attempted to submit the package or that the GD refused to admit it. The audio shows they did not raise any concerns that the GD was conducting the hearing unfairly. At the same time, there is no mention of a package, or the Appellant's failed bid to submit it, in the GD's subsequent reasons for its decision. Nevertheless, I am willing to believe the Appellant's claim that this matter was dealt with during a preliminary discussion before the GD member activated her recording device.

[33] As mentioned, the ICD codes were already before the GD, so its refusal to admit them is not at issue in this appeal. The question that remains is whether the GD beached a principle of natural justice in refusing to admit the Representative's written submissions just prior to the hearing.

[34] I will begin by noting that the Appellant and his Representative have had ample opportunity to file submissions. This appeal has been active in one form or another since November 2011—three years before the hearing at the GD. Paragraph 27(1)(a) of the *Social Security Tribunal Regulations* allows the parties to file additional documents or submissions within 365 days after the day on which the appeal is filed. Theoretically, neither the DESDA nor the Regulations specifically preclude a party from filing any additional documents or submissions after the lapse of 365 days after the day on which the appeal is filed. At the time this case was heard by the GD, the Social Security Tribunal's practice was to allow a party to continue filing documents or submissions until a specified date or within 30 days of a scheduled hearing date, subject to the discretion of the member. Here, the Social Security Tribunal notified the parties by letter dated July 25, 2014 that any additional documents or submissions could be filed until September 26, 2014. The Representative availed herself of the opportunity to file additional documents on August 25, 2014 but did not file the submissions that she attempted to file during the hearing of the appeal.

[35] I find that the GD was acting within its discretionary power when it refused the 40-page script and in doing so did not breach any rule of procedural fairness. I now turn my attention to whether the GD acted contrary to the principles of natural justice in the way it conducted the hearing.

[36] In the Application for Leave to Appeal and in her answers to the AD's questions, the Representative alleged that the GD's conduct hindered her from making adequate and effective submissions during the hearing. She said she is more effective when she can read and refer to documents when making oral submissions. Both the Appellant and his Representative allege that they were flustered by the GD's refusal to accept written submissions and their ability to concentrate during the proceedings was negatively affected, leaving them poorly equipped to present and defend their case.

[37] It remains unclear to me why the written submissions had to have been filed with the GD for the Representative to be able to refer to and read them during the course of making oral submissions. In any case, the written submissions are approximately 7,000 words, and if the Representative intended to read them verbatim, it would have taken, by my estimate, an hour or more, leaving only limited time in the allotted 90 minutes for introductory remarks and questioning of the Appellant himself.

[38] Despite the GD's refusal of the written submissions and the strictures imposed by the scheduled time allotment, I found no evidence that the Appellant and his Representative were prevented from fully preventing their case. In a hearing that lasted 80 minutes (excluding the initial portion that was presumably unrecorded), the Representative went through the written submissions, reading parts of it, paraphrasing others and engaging in periodic exchanges with the GD member, clarifying and amplifying points where necessary. To my ears, the Representative sounded relaxed, engaged and in command of her presentation. The majority of the recording was occupied with the Representative's submissions, with the Appellant saying very little, although he did answer the GD's questions when asked. At no point did the GD member cut off the Representative, nor did she ever urge her to hurry up or shorten her submissions. At the end of the hearing, the Representative did not request additional time to make further remarks.
Finally, the hearing appeared to cover all the major issues that were raised in the written submissions.

[39] Contrary to the Appellant's submissions, two of the most contentious issues received thorough airings at the hearing. The recording indicates that the Representative was permitted on at least two occasions (at 9:00 and 16:00) to raise the ICD coding system and explain how it related to the Appellant's claimed disabilities. Although the Representative claims that the GD summarily ruled the MQP date to be December 31, 2006 before the recorder was turned on, the audio contains extensive discussion and debate about the issue. At 2:00, the GD member attempted to explain how the MQP was determined, but was challenged by the Representative, who asked, "When do they start counting the six years back from—2009 or 2006?" A three-minute long discussion ensued, although the Representative remained unconvinced that the MQP had been calculated correctly. Eventually, the Representative agreed to proceed on the

basis of the December 31, 2006 MQP, but declared that she would “fight it to the end.” The MQP was briefly raised again at the 35-minute mark, and the Representative again made it known that she did not agree with the prevailing MQP date.

[40] In the end, I must disagree that the Appellant and his Representative were not permitted to make submissions on the MQP at the hearing. The record shows that they did so vigorously, having already been given many opportunities over the years to introduce further evidence of the Appellant’s qualified earnings and contributions. In fact, they did succeed in updating the Record of Earnings to show qualified earnings and contributions in 2008 and 2009, but these additional years had no effect on the MQP, and the Representative later argued the Appellant’s service contracts during those years constituted a failed work trial.

[41] Although the Representative may not have agreed that the Appellant was last eligible for disability benefits on December 31, 2006, the GD nevertheless had the authority under the CPP and DESDA to make a determination of the MQP by applying the available facts to the law, having heard submissions from both parties. Section 97 of the CPP deems amounts shown in a Record of Earnings to be accurate after four years have elapsed from the end of the year in which the last entry was made. According to the updated Record of Earnings on p. GT8-6, the most recent six-year window in which the Appellant had three years of valid earnings ended on December 31, 2006. I note that the six-year window ending December 31, 2009 contained the years 2004-09 inclusively, only two of which had valid earnings. As such, I am satisfied that the Respondent’s calculation of the MQP, as ratified by the GD, was calculated correctly and no error in fact or law was made.

[42] In my view, it was a lapse in procedure for the GD not to have documented its rulings on the MQP and the Appellant’s attempt to submit last-minute documents. On both issues, the GD should have noted the Appellant’s objections and explained why it felt they had no merit. The GD’s decision contained no hint of the Appellant’s disagreement with the determination of the MQP, and there was no attempt to explain the calculation of December 31, 2006. The GD also made no mention of its refusal to receive written material past the specified submission deadline or explain its reasons for not doing so. As the Supreme Court of Canada held in *Baker*

v. *Canada*[4], where a decision has important significance for the individual or when there is a statutory right of appeal, fairness demands that sufficient reasons be provided. This is especially so where, as in this case, a ruling is otherwise undocumented.

[43] It is the practice of the Social Security Tribunal to record hearings, although neither the DESDA nor the *Social Security Regulations* impose an obligation to do so. In *SCFP Local 301 v. Canada*[5], the Supreme Court indicated that unless there is a legal obligation to record the hearing, it is not a breach of natural justice if the appellant can raise the issue without the use of the transcript. It is clear in this case that the Appellant was able to raise the issue even if the recording appears not to be complete. In *Patry v. Canada*[6] among other cases, the Federal Court of Appeal has confirmed rulings of the Employment Insurance Umpire that the failure to provide a recording did not invalidate the proceedings.

[44] Still, as a matter of form, and for the protection of all participants, the GD should have recorded the entirety of the proceedings, particularly discussions (it is alleged) involving the admission of documents or the determination of the MQP, even if they were conducted in what seemed to be a casual context. That being said, I do not think that the GD's failure to document its rulings, or record the portion of the hearing in which those rulings were made, qualified as a material breach of natural justice. A question to be asked is whether any GD member would have decided the appeal differently had it received the Representative's 40-page script, to which I must answer "no" because, as explained above, the Appellant was afforded an opportunity to make full submissions by other means. In addition, any deficiency in how the MQP ruling was delivered is rendered moot by the fact that the MQP was ultimately determined correctly. For these reasons, I find that the GD did not act contrary to the principles of natural justice.

[45] Finally, I note that the answers given by the Appellant and his Representative in their letter of April 27, 2016 contained arguments that, in essence, recapitulated their submissions before the GD and duplicated many of the claimed grounds—including allegations of bias and non-jurisdiction—that had already been extinguished by the AD's Leave to Appeal decision of June 2, 2015. A large part of the submissions of the Appellant and his Representative amounted

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[4] *Baker* v. *Canada* (*Minister of Citizenship and Immigration*), [1999] 2 SCR 817
[5] *SCFP Local 301 v. Québec (Conseil des services essentiels)*, [1997] 1 SCR 795
[6] *Patry v. Canada (AG,)* 2007 FCA 301

to a request to reassess the evidence on its merits, but I was unable to do so given the constraints of subsection 58(1) of the DESDA.

(c) Remedy

[46] As I have found that the GD did not breach any rule of natural justice, I am confirming its decision.

CONCLUSION

[47] The appeal is therefore dismissed.

Member, Appeal Division