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

Citation: *J. L. v. Minister of Employment and Social Development*, 2016 SSTADIS 249

Tribunal File Number: AD-15-967

BETWEEN:

J. L.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

HEARD ON June 28, 2016

DATE OF DECISION: July 5, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant	J. L.
Representatives for the Appellant	Grace Jackson
	Ashley Smith (Articling student – observer only)
Representatives for the Respondent	Christine Singh
	Sarah Newman (Articling student – observer only)
	Anne Lacavalier (Articling student – observer only)

INTRODUCTION

[1] This is an appeal of a decision of the General Division (GD) of the Social Security Tribunal issued on June 2, 2015, 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, 2010. Leave to appeal was granted on September 29, 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 August 2011. He was 37 years old at the time and had a grade 12 education. He had worked as a commercial construction framer until suffering a workplace injury in October 2008 and had not worked since then.

[3] In his CPP Questionnaire, the Appellant said that he suffered from severe and debilitating pain in his right ankle and left wrist, leaving him unable to walk without a cane or perform numerous everyday tasks. He also complained of sleeplessness, fatigue and an inability to concentrate.

[4] At an in-person hearing on May 29, 2015, the Appellant testified that his wife did all the housework, although he acknowledged looking after their three children while she was at her job. He had participated in a vocational rehabilitation program, and completed an eight-week retraining course in marketing and sales essentials. He testified that he applied for employment as telemarketer but was unable to find a job.

[5] In its decision dated June 2, 2015, the GD found that the Appellant had the capacity to work within his restrictions. After reviewing the medical evidence, it concluded that there was minimal objective evidence of serious pathology to account for the extreme reports of pain and loss of functional abilities. It also found that he had the capacity to retrain but had not made sufficient effort to find alternative employment suitable to his limitations, nor had he pursued all available treatment options.

[6] On or about August 20, 2015, the Appellant filed an Application for Leave to Appeal (LTA) with the Appeal Division (AD) of the Social Security Tribunal alleging numerous errors on the part of the GD. On September 29, 2015, the AD granted leave on the sole ground that the GD may have relied on erroneous findings of fact in discounting the medical report of Dr. Fadi Tarazi dated January 24, 2014.

[7] On April 12, 2016, the AD scheduled a hearing of the appeal by way of teleconference for the following reasons:

(a) The need for additional information;

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

(c) The preference of the Appellant for an oral hearing;

(d) 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 dated August 20, 2015. The Appellant made further written submissions on November 13, 2015. The Respondent also filed written submissions on November 13, 2015.

THE LAW

[9] 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

[10] 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 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.

[11] 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

[12] The issues before me are as follows:

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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

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

(b) Did the GD make an erroneous finding of fact when it deemed Dr. Tarazi's report unreliable?

SUBMISSIONS

(a) What is the standard of review?

[13] The Appellant made no written submissions on the appropriate standard of review or the level of deference owed by the AD to determinations made by the GD. In oral argument, counsel suggested that the AD owed a low threshold of deference to the GD in determinations of fact.

[14] The Respondent's 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 of 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 oral argument, counsel submitted that *Huruglica* did not appreciably change the standard to be applied to alleged factual errors; the language of paragraph 58(1)(c) of the DESDA continued to permit a wide range of acceptable outcomes.

(b) Did the GD err in deeming Dr. Tarazi's report unreliable?

[15] In submissions dated November 13, 2015, the Appellant's representative accepted that the sole ground for leave to appeal was the weight given by the GD to the medical opinions of Drs. Thinda and Tarazi, a psychologist and orthopedic specialist, respectively. The Appellant's representative agreed with the AD's determination at leave that it would have been an error of law had the GD found that the two physicians were advocating on behalf of the Appellant simply because counsel had requested them to produce medical reports. The Appellant's representative submitted that the GD erred in minimizing the opinions provided by Drs. Thinda and Tarazi because their reports were prepared after the MQP. In her view, these reports were relevant and addressed issues not examined anywhere. They should not have been dismissed out of hand.

[16] In oral submissions, the Appellant's representative also criticized what she described as circular reasoning on the part of the GD: Having found the Appellant to be less than credible, the GD faulted Dr. Tarazi's report for giving credence to the Appellant's subjective pain complaints.

[17] In written and oral submissions, the Respondent argued that the decision of the GD does not contain an error of fact that was made without regard to the material before it. First, the GD was within its jurisdiction as trier of fact to prefer the reports of other medical professionals over those of Dr. Tarazi, and in doing so committed no error that would justify the AD's intervention. Second, the GD reviewed all evidence before it, and its decision is reasonable and fits within the broad spectrum of outcomes. Given the totality of the medical evidence before the GD, the outcome would be the same, regardless of the emphasis placed on Dr. Tarazi's report.

[18] The Respondent also submitted that the GD found Dr. Tarazi's opinion was unreliable for numerous reasons other than the mere fact that it was commissioned by counsel, among them: (i) it was prepared several years after the Appellant's MQP; (ii) there were minimal objective medical findings; (iii) it incorporated assumptions regarding the medical findings and continuing complaints; (iv) there was no mention of functional testing or objective medical evidence; and (v) the sole focus of the report was whether the Appellant could return to his previous employment. As such, it was reasonable of the GD not to assign significant weight to the report.

[19] The Respondent also noted that Dr. Tarazi's report found the Appellant's physical limitations would prohibit him from returning to his previous job as a commercial framer, but it did not address whether there were alternative occupations that would accommodate those limitations. There was no other evidence to support the Appellant's argument that his left wrist symptoms affected his employability.

ANALYSIS

(a) Standard of Review

[20] 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."

[21] 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].

[22] 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.

[23] 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) Reliability of Dr. Tarazi's Report

[24] Although the Appellant also objects to the dismissal of Dr. Thinda's opinion, I will confine my analysis to how the GD dealt with Dr. Tarazi's report, which was the focus of the AD's earlier LTA decision.

[25] In paragraph 26 of its decision, the GD summarized Dr. Tarazi's January 2014 report as follows:

> In his opinion, the Appellant sustained a styloid fracture in the work place accident in October 2008 and was aggravated by typing during retraining efforts. Due to pain and diminished mobility, soft tissue contractures have developed. He said the Appellant will need to modify his activities to accommodate the wrist pain on a permanent basis, including work functions and daily activities. In Dr. Tarazi's opinion, due to reduced right ankle ambulation, and pain, as well as left wrist pain and loss of mobility, the Appellant is now "practically unemployable".

[26] In its analysis, the GD found (at paragraphs 44 and 45) that Dr. Tarazi's report was unreliable for several reasons: (i) it was prepared at the request of the Appellant's representative;
(ii) it was prepared several years after the Appellant's MQP; (iii) it described physical limitation that were supported by minimal objective medical findings; (iv) it incorporated assumptions regarding the medical findings and continuing complaints due to the effluxion of time since the workplace injuries; (v) it made no mention of functional testing or objective medical evidence; and (vi) the sole focus of the report was whether the Appellant could return to his previous employment.

[27] In his Application for Leave to Appeal, the Appellant submitted that the GD based its decision on an erroneous finding of fact when it found that Dr. Tarazi was necessarily advocating on behalf of the Applicant because it had been commissioned by counsel. In its LTA decision, the AD dismissed this ground because it was only one of several that the GD cited in minimizing Dr. Tarazi's opinion. Nevertheless, the AD granted leave because it saw an arguable case that some of those additional grounds were founded in errors of fact.

[28] First, I do not agree with the suggestion that the GD simply dismissed Dr. Tarazi's report. In deeming it unreliable, the GD was in effect assigning it low weight, which as the trier of fact, it was entitled to do, provided it adequately explained its rationale for doing so.

[29] One of the major reasons underlying the GD's concern about the Tarazi report was the fact it was prepared several years after the Appellant's MQP. The GD also expressed doubt about its reliability because the "effluxion of time since the workplace injuries" forced Dr. Tarazi to make assumptions about the Appellant's condition and complaints. I agree that dismissing evidence solely because it was prepared after the MQP is unreasonable and contrary to the rules of procedural fairness, but as already noted, the GD did not simply "dismiss" Dr. Tarazi's report or fail to give it any consideration. Moreover, an assessor's temporal distance from an injury, or the eligibility period in which that injury occurred, is a relevant factor in determining what weight to assign an item of evidence. Indeed, prior cases[3] have held that while the CPP Review Tribunal (a predecessor body to the SST) could not ignore medical reports simply because they were prepared after the MQP, it was entitled to give them less weight in assessing the severity of the Appellant's claimed disability.

[30] That said, Dr. Tarazi, despite having never previously examined the Appellant, did make findings and conclusions that related to the Appellant's condition and functionality prior to the MQP. The Appellant has raised the question of whether the GD mischaracterized those findings and conclusions when it determined Dr. Tarazi's opinion should carry little weight.

[31] In paragraph 44, the GD said that there were "minimal objective findings" to support the Appellant's claimed physical limitations, yet Dr. Tarazi's report noted that a November 2012 MRI scan of the left wrist revealed an old non-united fracture of the ulnar styloid process. It was Dr. Tarazi's opinion that the fracture was likely sustained in the Appellant's October 2008 workplace accident, but it was overshadowed by his other, more serious, injuries. Dr. Tarazi thought the wrist injury likely became more noticeable two years later, when the Appellant began to increase his physical activity level.

[32] A close reading of the GD's decision indicates that it did not accurately describe the contents of Dr. Tarazi's report. It is true, as noted by the Respondent, that the GD never said there was a complete absence of objective evidence for the Appellant's left wrist complaints but that there was *minimal* objective evidence. This is not an absolute statement, and one can

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[3] *Rochford v. Canada (MHRD),* 2004 FCA 294; *Bagri v. Canada (AG),* 2006 FCA 134; *Gilroy v. Canada (AG),* 2008 FCA 116; *Canada (AG) v. Ryall* 2008 FCA 164

reasonably say it was compatible with Dr. Tarazi's comments. While he did note signs of an old non-united wrist fracture, he also relayed the accompanying comments from the MRI report:

> The triangular fibrocartilage was reported to be intact. The distal radio-ulnar joint and the carpal ligaments were also normal. There was no abnormality in the flexor and extensor tendons. The carpal tunnel structures were also normal.

[33] Whether this description qualified as "minimal objective evidence" is debatable, but I do not think that it was an error that could be fairly called "perverse or capricious" or "made without regard for the facts."

[34] However, the GD's statement in paragraph 45 was more problematic:

> In his 2014 report, Dr. Tarazi said the Appellant is practically unemployable, yet he did not mention the results of any functional testing or comment on objective medical evidence to support his opinion.

[35] While it is true that Dr. Tarazi did not refer to formal functional testing of the kind usually performed by an occupational therapist, he did perform what appears to have been a fairly thorough physical examination of the Appellant's upper extremities. His findings included significant signs of pain and restrictions in flexion and extension of the left wrist, as compared to the right side. It is simply incorrect to say that Dr. Tarazi did not comment on objective medical evidence when significant portions of his report were occupied with discussing the old wrist fracture that was revealed in the November 2012 MRI, including important matters such as when it likely occurred, why it was not reported earlier, how it healed and what effect it was likely to have on the Appellant's functionality in the future.

[36] In paragraph 45, the GD also found that Dr. Tarazi's report was prepared with a focus on the Applicant's ability to return to his former job, and "not on other employment options including part-time, since neither report comments on alternative employment." Yet Dr. Tarazi also said:

> In my opinion, his left wrist condition is causing significant limitations. He is not suited for any physically laborious jobs anymore. He also is not suited to do any jobs that involve lifting, twisting or turning with the left hand. Jobs that require typing should also be avoided. In my opinion, Mr. J. L. will have very significant difficulty finding gainful employment, secondary to his multiple injuries sustained in the work accident of October 31, 2008. He is not able to walk on his right foot and uses a cane in the right hand.

> His left hand function is also quite limited. It is my opinion that he is now practically unemployable, secondary to his work injuries of October 31, 2008.

[37] Again, I find that the GD did not accurately convey the substance of Dr. Tarazi's report, which, on my reading, addressed more than just the Appellant's capacity to perform the tasks of his previous job as a construction worker. Restrictions that prevent the Appellant from using a keyboard would have a significant impact on his ability to retrain or find or maintain a sedentary job, yet the implications of his wrist injury were hardly considered in the GD's decision.

[38] These errors are material. Had the Tarazi report been given more consideration, it is possible that the GD would have arrived at a different outcome. In making these findings, I am not challenging the GD's jurisdiction as trier of fact to review the evidence and assign it appropriate weight. However, in this case, the GD diminished the Tarazi report for two reasons that were not founded in reality. In declaring that Dr. Tarazi made no comment on objective medical evidence and only focused on the Appellant's capacity to perform his former job, the GD based its decision on erroneous findings of fact without regard for the evidence before it.

CONCLUSION

[39] For the reasons set out above, the appeal is allowed.

[40] Section 59 of the DESDA sets out the remedies that the AD can give on appeal. To avoid any potential for an apprehension of bias, it is appropriate in this case that the matter be referred back to the GD for a *de novo* hearing before a different member of the GD.

Member, Appeal Division