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

Citation: *B. K. v. Minister of Employment and Social Development*, 2016 SSTADIS 307

Tribunal File Number: AD-16-163

BETWEEN:

B. K.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: August 10, 2016

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] This is an appeal of a decision of the General Division (GD) of the Social Security Tribunal issued on October 15, 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, 2013. On April 30, 2016, the Appeal Division (AD) granted leave to appeal 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 2012, when he was 56 years of age. He was born in Eastern Europe and immigrated to Canada in 1977. For 12 years, he was employed as a machinist for the Canadian Pacific Railway and then earned a two-year electronic engineering diploma at Red River College in X. He went on to work for a number of different employers as an engineering technologist with a focus on nuclear accelerators, mostly recently for the cancer centre at Lakeridge Health X, a job he held from November 2006 to May 2010, when he was laid off. He had previously injured his back when he tripped while carrying a large metal cover at work.

[4] Following his layoff, the Appellant was diagnosed with diabetic retinopathy in August 2011, and he eventually underwent nine laser eye surgeries. It was subsequently determined that the Appellant had been diabetic for six or seven years without receiving treatment, causing damage to nerves in his eyes and feet.

[5] At an in-person hearing on September 23, 2015, the Appellant testified that, as a result of his diagnosis of diabetes and associated retinopathy, he was no longer able to work, although

he had unsuccessfully applied for various jobs. He took considerable amount of prescribed medication to treat his medical issues, which also included depression, anxiety, high blood pressure and ADHD (Attention Hyperactivity and Deficit Disorder). The Appellant said he felt that he was caught in a vicious cycle—he had to take medication in order to manage his pain and remain as functional as possible but taking those medications also made him impaired. His main goal was to manage his diabetes to ensure that he remained able to walk, as he foresaw his health degenerating very quickly if he were to become immobilized.

[6] In its decision of October 15, 2015, the GD found that the Appellant had the capacity to work within his restrictions. After reviewing the medical evidence, it concluded that the Appellant's diabetes was under control with daily insulin injections and regular blood sugar monitoring. While the GD accepted the Appellant's testimony that he suffered from nerve damage as a result of his undiagnosed and untreated diabetes, it found nothing to indicate that these conditions precluded him from any substantially gainful employment.

[7] On January 14, 2016, 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. I have decided that an oral hearing is unnecessary and the appeal can proceed on the basis of the documentary record for the following reasons:

(a) There are 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.

[8] The Appellant's submissions were set out in its Application for Leave to Appeal and in submissions filed June 13, 2016. On the same date, the Respondent filed its written submissions.

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:

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

(b) Did the GD base its decision on an erroneous finding of fact when it considered the Appellant's use of narcotic pain medications and their dosages?

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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

SUBMISSIONS

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.

[14] The Respondent noted that the Federal Court of Appeal had not yet settled on a fixed approach for the AD in considering appeals from the GD. The Respondent acknowledged *Huruglica*, which it said confirmed that the AD's analysis should be influenced by factors such as the wording of the enabling legislation, the intent of the legislature when creating the tribunal, and the fact that the legislature or is empowered to set the standard of review would. It was the Respondent's view 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.

[15] The Respondent submits that the AD should not engage in a redetermination of matters in which the GD has a significant advantage as trier of fact. The wording of sections 58 and 59 of the DESDA indicate that Parliament intended that the AD show deference to the GD's finding of fact and mixed fact and law.

Finding of Narcotic Pain Medications and Dosages

[16] In his Application for Leave to Appeal, the Appellant alleged that the GD based its decision on an erroneous finding of fact when it described his dosage of pain medications as "Endocet 5 mg oxycodone/325 mg acetaminophen 2 tablets 4 times a day." The Appellant stated that this was incorrect as of the MQP as he was actually prescribed "Endocet 5 mg oxycodone/325 mg acetaminophen 2 tablets 3 times a day and 12 mg Hydromorph Cotin [sic] once per night," which he alleged was the equivalent of 100 mg of morphine or 12 Percocet per day.

[17] On June 13, 2016, the Appellant submitted a self-prepared fact sheet entitled "Conversion and Duration of Opioid Analgesics" with supporting documents comprised of printouts from and medical-oriented websites.

[18] In written submissions, the Respondent argued that the GD did not base its decision on an error of fact that was made without regard to the material before it. Although the GD did not explicitly include the 12 mg of Hydromorph Contin in paragraph 13 of its decision, the GD's reasons indicate that it considered the potential effects that narcotic-based medications could have on his ability to function. As held in *Simpson v. Canada*,[3] administrative decision-makers are not required to refer to each and every piece of evidence before them. The GD noted in paragraphs 13 and 16 that the Appellant took a considerable amount of prescription medication, which he felt impaired his functioning.

[19] The Respondent suggests that in this case the GD's omission of Hydromorph Contin was minor and had little or no bearing on its final decision. The GD was aware that the Appellant might suffer from similar side effects, as those caused by Hydromorph Contin resemble the side effects—including dizziness, drowsiness and nausea—potentially caused by several of the medications previously prescribed to the Appellant. In particular, Endocet, another narcotic- based medication explicitly referenced by the GD, has potential side effects, precautions and drug interactions that are similar to those for Hydromorph Contin.

[20] The Respondent also submits that the GD was reasonable in finding there was nothing to corroborate the Appellant's claim of disability. The only evidence supporting the Appellant's testimony about side effects was generic documentation prepared by pharmaceutical manufacturers that was nonspecific to the Appellant. In fact, none of his doctors indicated that he lacked capacity to work or retrain. The inadvertent omission of Hydromorph Contin was not a perverse or capricious error that rendered the GD's reasoning invalid.

ANALYSIS

Standard of Review

[21] 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

[3] Simpson v. Canada (Attorney General), 2012 FCA 82

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.”

[22] 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].

[23] 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.

[24] 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 only intervene when the GD bases its decision on an error that is clearly egregious or at odds with the record.

Narcotic Pain Medications and Dosages

[25] My review of the material suggests that the GD did make a factual error. In paragraph 13 of its decision, the GD noted that the Appellant “testified today he takes a considerable amount of prescribed medication to treat his medical issues” and followed this with a long list of drugs and dosages, among them “Endocet 5 mg oxycodone/325 mg acetaminophen 2 tablets 4 times a day.” This corresponded to a list provided by the Appellant in his letter of April 2, 2013 (p. GD5-12) requesting reconsideration, but it was updated eight months later. In a schedule accompanying his appeal to the GD on January 2, 2014 (p. GD1A-8), the Appellant

compiled a list of medications that included “Endocet 5 mg oxycodone/325 mg acetaminophen 2 tablets 3 times a day and 12 mg Hydromorph Cotin [sic] once per night.”

[26] While this error may not be “capricious or perverse,” I think it can be fairly said it was “made without regard to the material before it.” I acknowledge that there appears to be no evidence, other than the Appellant’s own written statements, corroborating his claim that his prescription pain medications were increased between April 2013 and January 2014. Nevertheless, the GD did not question the Appellant’s credibility, and there is no reason to doubt that he was prescribed Hydromorph Contin prior to the MQP (although by whom and for what specific reason remains unknown). Having reviewed the relevant portion of the hearing recording, I am further persuaded that the GD erred. At around the 1:04 mark, the GD member referred the Appellant to the January 2, 2014 medication list and asked whether it remained accurate. The Appellant clearly replied that there had been no change in his prescriptions, which suggests that the GD relied on the out-of-date list when it came time to prepare its decision.

[27] The question arises whether the GD’s omission of Hydromorph Contin amounted to a material error. In other words, did the GD base its decision on the erroneous finding of fact and would the outcome have likely differed if the error had not been made? On balance, I must answer that question with a yes. Although I recognize the imperative to defer to the GD on issues of fact-finding, I note here that the GD’s error was not a matter of perspective or interpretation but was clear-cut and unambiguous. It was made following the Appellant’s testimony that his greatest medical concern was pain caused by nerve damage to his feet as a result of unchecked diabetes. He testified that he managed this pain with increasing doses of pain medications, which caused side effects, such as dizziness and drowsiness, which were as disabling as his underlying conditions. The GD also disregarded a medication list that was prepared almost precisely at the end of the Appellant’s MQP.

[28] The Respondent submits that the GD did take into account the wide variety of medications taken by the Appellant and deemed the omission of Hydromorph Contin as “minor,” since its side effects resembled those of Endocet, another narcotic-based painkiller that the Appellant was already taking. I find this argument facile; while it may be true that both narcotic painkillers can cause dizziness, drowsiness and nausea, the Appellant’s point was that

he was put on a significantly higher dose of narcotics, with the addition of Hydromorph Contin, than the GD recognized in its decision, and it was reasonable to assume that the side effects associated with the higher dose would be that much greater. The Respondent endorsed the GD's dismissal of documentation from pharmaceutical manufacturers as "generic," but merely because the information about the side effects of narcotic painkillers was not specific to the Appellant did not mean it lacked value. In my view, it would have been reasonable to infer that an individual taking a dose of opioids at the levels claimed by the Appellant would experience at least some measure of drowsiness or dizziness.

[29] The Appellant submitted a fact sheet on opioid analgesic equivalencies, but none of this material was before the GD, and the AD is not a forum in which new evidence can ordinarily be considered. However, the hearing recording indicates that the Appellant attempted to convey in his oral submissions that a unit of Hydromorph Contin is more potent than a unit of Endocet. It appears that the GD did not appreciate this point.

[30] In paragraph 30 of its decision, the GD drew an adverse inference from the fact that the Appellant did not claim to be impaired by his medications in the questionnaire supporting his CPP disability application, yet in the next sentence it noted that the Appellant claimed his medications made him tired, dizzy, drowsy and unable to drive a car. In my view, this apparent contradiction reflects the GD's inconsistent approach to the issue of the Appellant's pain medications and the impact of their side effects on his ability to work.

[31] I therefore find that the GD based its decision on an erroneous finding of fact without regard for the material before it—specifically, that it omitted from its consideration the 12 mg of Hydromorph Contin the Appellant claimed to be taking daily and therefore discounted his testimony of heightened and debilitating side effects such as drowsiness and dizziness. Such an omission was material, as much of the Appellant's case was based on his claim that he was impaired by narcotic-based pain killers, and the GD's decision was based on its finding that the side effects from those medications was insignificant .

CONCLUSION

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

[33] 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