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

Citation: *L. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 326

Tribunal File Number: AD-16-177

BETWEEN:

L. M.

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 22, 2016

REASONS AND DECISION

DECISION

The appeal is dismissed.

INTRODUCTION

[1] This is an appeal of the decision of the General Division (GD) of the Social Security Tribunal issued on October 26, 2015, which dismissed the Appellant's application for a disability pension on the basis that she 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, 2008. Leave to appeal was granted on April 29, 2016, on the grounds that the GD may have erred in rendering its decision.

OVERVIEW

[2] The Appellant was 41 years old when she submitted an application for CPP disability benefits in August 2008. She indicated that she is a high school graduate and has been trained as a dental assistant. She was employed as a line worker in a factory until April 2006, when she was injured in a motor vehicle accident (MVA).

[3] In the questionnaire accompanying her CPP application, the Appellant listed as her main disabling condition low back pain, which she said prevents prolonged standing, sitting, lying down, bending, twisting and lifting. She had received physiotherapy and was taking prescription pain relievers, none of which had an appreciable beneficial effect.

[4] At the videoconference hearing before the GD on October 22, 2015, the Appellant testified that her back pain and inability to support her family had led to her becoming depressed. She was taking antidepressant medications and had received psychological counselling, although she had not seen a psychiatrist. She had not worked, looked for work or attended any retraining or educational upgrading program since the MVA.

[5] In its decision, the GD found that the Appellant's disability fell short of the requisite severity threshold. It noted that numerous investigative reports, including imaging of the Appellant's spine, indicated minimal pathology. It found no medical evidence that the Appellant was treated for mental illness prior to her MQP. It found that the Appellant's treatment for back pain had been conservative, consisting of chiropractic treatment, physiotherapy, epidural injections and medication. While the GD accepted that the Appellant suffered from back pain, it was not persuaded that it precluded her from regularly pursuing any substantially gainful occupation.

[6] On January 19, 2016, 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 April 29, 2016, the AD granted leave on the grounds that the GD may have based its decision on erroneous findings of fact by:

(a) Mischaracterizing Dr. Waisman's conclusions to mean the Appellant suffered no incapacity prior to the MQP; and

(b) Drawing an unsupported inference from the Applicant's non-attendance at a work hardening program.

[7] I have decided to proceed on the basis of the documentary record for the following reasons:

(a) The complexity of the issues under appeal;

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

(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 her Application for Leave to Appeal and Notice of Appeal of January 19, 2016. The Respondent filed submissions with the AD on June 13, 2016.

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.

[10] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

(a) Be under 65 years of age;

(b) Not be in receipt of the CPP retirement pension;

(c) Be disabled; and

(d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[11] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[12] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

ISSUES

[13] The issues before me are as follows:

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

(b) Did the GD base its decision on an erroneous finding of fact when it said that Dr. Waisman found the Appellant "substantially unable" to perform any occupation, as opposed to "precluded" from performing any occupation?

(c) Did the GD base its decision on an erroneous finding of fact by drawing an unsupported inference from the Appellant's non-attendance at a work hardening program?

SUBMISSIONS

(a) What is the appropriate standard of review?

[14] The Appellant submits that the appropriate standard of review for this appeal should be that of correctness because no deference is due to the GD. The AD is a superior arm of the same tribunal—there is no special expertise or experience which privileges a determination of the GD. The Appellant also notes that the member who decided this case at the GD is regularly a member of the AD, although it acknowledges that training may differ between the two divisions.

[15] On the granted grounds for appeal, the relevant issue is not the weighing of evidence but rather the GD having exceeded its jurisdiction by either failing to consider highly relevant evidence or by making statements of fact with no evidentiary support. Where jurisdiction is concerned, the standard of review is correctness.

[16] 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.

[17] 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 the recent Federal Court of Appeal case, *Canada (MCI) v. Huruglica*,[1] 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 is empowered to set the standard of review. 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.

[18] 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.

(b) Did the GD mischaracterize Dr. Waisman's findings?

[19] The Appellant submits that, although she was not formally diagnosed with major depression and pain disorder until after her MQP, Dr. Waisman, who is a psychiatrist, concluded that these severe impairments existed prior to December 31, 2008. On page 14 of his assessment dated February 22, 2014, Dr. Waisman found that the Appellant still had severe pain causing spasms, cognitive deficits, depression, fatigue and sleep disturbances, all of which started after the MVA of April 21, 2006. On page 18, Dr. Waisman diagnosed the Appellant with a "severe impairment in affect regulation and chronic pain," which he said started immediately following the accident.

[20] The Appellant acknowledges that the GD properly confirmed at paragraph 49 of its decision that Dr. Waisman had concluded that the Appellant was substantially unable to perform any occupation for which she was reasonably suited by education, training and experience. However, the Appellant alleges the GD erred when it went on to find that Dr. Waisman's opinion did not indicate such incapacity existed prior to the Appellant's MQP. The GD wrote:

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

> …Dr. Waisman's assessment was to the effect she is substantially unable, as opposed to precluded, from any occupation, and his opinion did not indicate such incapacity existed prior to the Appellant's MQP.

[21] The Appellant alleges the GD mischaracterized Dr. Waisman's assessment to mean no incapacity existed prior to the Applicant's MQP.

[22] The Respondent submits that the GD assessed Dr. Waisman's report and reasonably found that her mental illness, along with her other functional limitations, did not render her incapable regularly of pursuing any substantially gainful occupation before or at her MQP.

[23] The GD's conclusions regarding the Appellant's mental illness must be read in context of the legal test for severity. According to *Klabouch v. Canada*,[2] it is the capacity to work, and not the diagnosis or the disease, that determines the severity of the disability under the CPP. The Respondent submits that the GD, in paragraph 49 of its decision, was not referring to the Appellant's diagnosis at the MQP, but rather her incapacity. As such, the GD did what it was required to do, which was look at whether the Appellant's impairments affected her work capacity. It reasonably concluded that the evidence suggested incapacity did not exist at the MQP.

[24] As noted by the GD, there were no medical reports before or at MQP that identified any impairments related to mental illness. Furthermore, the GD stated at paragraph 55 that "there is no evidence the Appellant was suffering from any severe mental illness prior to her MQP, and no mention of it in the questionnaire or notice of appeal." The Respondent submits that this statement must be read within the context of the legal test for severity. The GD was making a finding about whether the mental illness was "severe" within the meaning of the CPP, rather than whether there was any evidence of mental illness impairment at MQP. Paragraphs 35 and 36 indicate that the GD was aware of Dr. Waisman's and other specialists' conclusions regarding the Appellant's diagnosis of mental illness and their opinions with regard to how her impairments affected her capacity to work. Paragraph 36 also suggests that the GD was aware that Dr. Waisman's conclusion was that the impairment started immediately following the MVA. However, the GD noted that Dr. Waisman's conclusions did not preclude all types of employment. Thus, it cannot be reasonably argued that the GD did not consider Dr. Waisman's conclusions the impact of the Applicant's ability to work.

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[2] *Klabouch v. Canada, (Social Development)* 2008 FCA 33

[25] The GD's decision demonstrates that it was alive to the evidence and to the legal question at issue and came to a result well within the range of reasonable outcomes. The evidence that did exist regarding mental illness was contradictory and did not demonstrate that the Appellant had impairments that precluded her ability to work in any substantially gainful occupation. The GD concluded that the Appellant's impairments did not affect her work capacity, which was a reasonable conclusion based on the evidence before it.

(c) Did the GD draw an unsupported inference from the Appellant's non-attendance at a work hardening program?

[26] The Appellant alleges that the GD's decision was based in part on her failure to attend a work hardening program, in apparent defiance of the recommendations of several assessors. The Appellant submits that this constituted an erroneous finding of fact because the GD disregarded conditions and qualifiers attached to those recommendations. In his report dated May 14, 2008, Dr. Jasey, an orthopedic surgeon, recommended enrollment in a work hardening program only if she were first to complete a minimum of 10 weeks of physiotherapy. However, on August 14, 2008, the Appellant's physiotherapist concluded that, despite extensive physiotherapy, the Appellant was not ready for work hardening. In his report of September 29, 2008, Dr. Kleinman, a physiatrist, also advised work hardening but also cautioned that the Appellant's prognosis was poor.

[27] The Respondent's position is that the GD did not err on this ground. Its conclusion that the Appellant did not attend a work hardening program was reasonable and amply supported by the evidence. There were multiple recommendations by various treating specialists for the Appellant to attend work hardening programs. Some of these recommendations were attached with qualifiers and conditions, and some of these were not. The GD extensively canvassed the evidence and chose to give weights to certain evidence over other evidence.

[28] During the course of the hearing, the GD questioned the Appellant about her attendance at work hardening program. It asked her directly if she had ever participated in such a program, as advised by various physicians, and she replied "no." The GD probed further, asking why she

had not attended such a program, and she replied that it was due to the excruciating pain, the effects of her medication and her depression.

[29] In paragraph 12, the GD stated that "the Appellant has not worked, look for work or attended any retraining or educational upgrading programs and she last worked on April 2006. She has not done so because of the constant back pain since the April 2006 accident and depression." This statement indicates that the GD considered the Appellant's testimony about why she had not attended a work hardening program.

[30] The GD went to great lengths to summarize the evidence before it regarding the Appellant's conditions. It cannot be reasonably argued that the GD was not alive to the evidence or the reasons why the Appellant alleged that she could not attend the work hardening program.

ANALYSIS

(a) Standard of Review

[31] 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.*[3] 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.

[32] The *Huruglica* case 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.

[33] 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

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

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."

[34] 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].

[35] 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.

[36] 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) Dr. Waisman's report

[37] Having reviewed the GD's treatment of the Waisman report, I must conclude that it did not misrepresent the consulting psychiatrist's assessment of the Appellant's mental health prior to the MQP ending December 31, 2008. At the outset, it is important to place Dr. Waisman's February 2014 report in context. This was a one-time independent psychiatric evaluation of the Appellant conducted more than five years after the MQP and nearly eight years after the MVA

that purportedly caused her disability. Any conclusions that Dr. Waisman drew about the Appellant's psychological impairments would have been based on essentially the same evidence—her medical records and her subjective responses to interview questions—that was available to the GD at its hearing. The difference—and this point was alluded to by the Respondent in its submissions—was that Dr. Waisman, unlike the GD, had no expertise or jurisdiction to apply the CPP's specific standard of disability as it is defined in paragraph 42(2)(a).

[38] The Appellant objects to the GD's finding in paragraph 49 of its decision that Dr. Waisman in effect assessed her as "substantially unable, as opposed to precluded, from any occupation," and that his opinion did not indicate incapacity existed prior to the MQP. It is important to note here that the GD was fully aware that Dr. Waisman was pronouncing on the Appellant's mental health immediately following the MVA, and it did not question his right to do so in a medical context. Indeed, the GD made explicit mention (at paragraph 36) of Dr. Waisman's conclusion that the Applicant suffered a severe impairment from a major depressive disorder and pain disorder immediately after her April 2006 MVA, which "precluded most useful occupational function in the areas for which she is reasonably suited by education, training, and experience."

[39] However, while Dr. Waisman may have used phrases such as "incapacity" or "substantial inability" or "impairment to mental and psychological functions" or "effectively precludes most useful functioning in this domain" to describe the Appellant's condition in the aftermath of the MVA, he did not say "disabled" or disability." Even if he had, he was not in a position to judge whether that disability was "severe and prolonged" according to the statutory definition contained in the CPP. In the circumstances, the GD was within its authority to interpret Dr. Waisman's report, weigh it in tandem with the other evidence of the Appellant's psychological condition prior to the MQP and apply their findings to the CPP's test for disability.

[40] The Appellant also made a similar argument when it faulted paragraph 55 of the GD's decision, which said, "There was no evidence that the Appellant was suffering from any severe mental illness prior to her MQP…" Again, I do not believe the GD meant to deny there was a

complete absence of evidence of psychological problems before 2009, just that there was no indication of "severe" psychological problems that were disabling according to the statutory definition. As mentioned, the GD was aware of Dr. Waisman's retrospective diagnoses and noted Dr. Sabga's May 2009 diagnosis of situational depression from chronic pain. It is true that Dr. Waisman diagnosed the Appellant with "severe impairments in affect regulation" immediately after the April 2006 MVA, but he was undoubtedly using the word "severe" in its commonplace or clinical senses; it is highly unlikely he had the CPP meaning of the word in mind, but even if he did, it is the purview of the GD to apply paragraph 42(2)(a) for the purpose of determining whether the Appellant was disabled.

[41] In the end, having assessed all the evidence, the GD concluded that the Appellant's condition did not meet the test. In the absence of a factual error that was not "capricious, perverse or without regard to the material," I would not interfere with the GD's conclusion that the Appellant's psychological impairments did not rise to the level of "severe" prior to the MQP.

(c) Non-attendance at work hardening

[42] It is clear that the GD based its decision, at least in part, on the fact that the Appellant never participated in a work hardening program, which was recommended by many of her assessors and treatment providers. In paragraph 46 of its decision, the GD wrote:

> [Dr. Kleinman] recommended, as did other assessors in reports dated before and after the Appellant's MQP, that the Appellant attend a work hardening program. The Tribunal considered such reports as evidencing capacity for at least sedentary type employment. The Appellant's evidence is to the effect she never attended a work hardening program.

[43] The Appellant alleges that the GD failed to consider the preconditions and limitations that Dr. Jasey and other specialists attached to their recommendations, but having reviewed their reports, I cannot agree. It is trite law that a trier of fact need not refer to each and every item of evidence before it. Even so, the GD's decision indicates it was aware that the recommendations to attend work hardening were not absolute. In paragraph 14, for example, the GD summarized Dr. Soriano's September 14, 2006 report, which recommended that the Appellant attend worked hardening for six to eight weeks, but only if the CT scan was

"reasonably normal." Dr. Soriano doubted that it would show significant pathology, and as it happens, the follow-up CT scan, as noted by the GD, was essentially normal.

[44] The Appellant noted that Dr. Jasey's May 2008 work hardening recommendation also came with the proviso that she first complete a minimum 10 weeks of physiotherapy. The Appellant alleges that the GD ignored this stipulation, as it did her physiotherapist's opinion that, despite extensive physiotherapy, she was not yet ready for work hardening. My review of these documents suggests that, whether or not the GD did ignored Dr. Jasey's precondition for work hardening, it had good reason to deem it immaterial. In his letter dated August 14, 2008, the physiotherapist, Anthony Mastrodicasa, wrote that the Appellant was making progress and recommended that she continue with physiotherapy before attempting a work hardening program. The letter suggests that while the physiotherapist did not feel she was ready for work hardening at that particular moment, he expected that she would be ready after another six weeks of his services. In my view, the GD can be forgiven if it did not think Dr. Jasey's precondition for work hardening was worth mentioning in its decision. The Appellant apparently gave evidence that she ultimately never did feel ready to attend work hardening, despite additional physiotherapy, but the GD was within its jurisdiction to weigh this statement against the recommendations—qualified or not—of her assessors and make an inference about her willingness to mitigate her injuries.

[45] On this ground, I disagree that the GD based its decision on an erroneous finding of fact.

CONCLUSION

[46] For the reasons discussed above, the appeal is dismissed.

Member, Appeal Division