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

Citation: *D. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 327

Tribunal File Number: AD-16-209

BETWEEN:

D. C.

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

Canada

REASONS AND DECISION

DECISION

The appeal is allowed.

INTRODUCTION

[1] This is an appeal of the decision of the General Division (GD) of the Social Security Tribunal issued on November 5, 2015, 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), by his minimum qualifying period (MQP) of December 31, 2013. Leave to appeal was granted on May 24, 2016, on the grounds that the GD may have erred in rendering its decision.

OVERVIEW

[2] The Appellant was 51 years old when he submitted an application for CPP disability benefits in May 2013. He indicated that he completed high school in Jamaica, his country of origin, and after immigrating to Canada, worked in a hotel and a factory. He was last employed as a truck driver from March 2008 to January 2011, when he stopped working after being diagnosed with a pituitary tumour.

[3] In the questionnaire accompanying his CPP application, the Appellant listed as his main disabling condition the pituitary tumour, which he said caused migraines, dizziness and blurred vision on a daily basis, as well as low testosterone, which affected his mood and caused muscle fatigue and weakness. He had been seen and treated by numerous specialists, but he claimed there had been no appreciable improvement in his pain or functionality.

[4] At the videoconference hearing before the GD on October 13, 2015, the Appellant testified that he started to get headaches and double vision when he was still working as a driver for a courier. After he was diagnosed with the tumour, his driver's license was suspended. His doctors had placed him on medication to shrink the tumour, but instead it had grown slightly. The Appellant told the GD that his back was painful, but he pushed himself to work. He had

hernias on both sides, for which he had received surgeries. The Appellant said that lactose accumulated in his chest, and he had undergone two mastectomies in order to reduce the build-up.

[5] In its decision, the GD found that the Appellant's disability fell short of the requisite severity threshold. It noted that his tumour had progressively shrunk and atrophied, and he had responded well to medical therapy. It also found that the Appellant's two mastectomies and two hernia surgeries were successful and had left him with no complications. While the GD accepted that the Appellant suffered from chronic back pain, it was not persuaded that it precluded him from pursuing any substantially gainful occupation.

[6] On January 26, 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 May 24, 2016, the AD granted leave on the grounds that the GD may have erred in:

(a) Finding the Appellant had never been referred to a specialist or taken any medications for his back pain;

(b) Finding treatments had been successful in shrinking the Appellant's pituitary tumour;

(c) Finding the Appellant's headaches and dizziness were disabling factors that led to the loss of his driver's license, yet he was not suffering from a severe disability**;**

(d) Failing to apply *Garrett v. Canada*[1] by not considering or applying the factors set out in *Villani v. Canada*;[2]

(e) Failing to apply *D'Errico v. Attorney General*[3] by disregarding the "regular" aspect of the disability severity test.

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[1] *Garrett v. Canada (Minister of Human Resources Development),* 2005 FCA 84
[2] *Villani* v. Canada (*A.G.),* 2001 FCA 248
[3] *D'Errico v. Attorney General,* 2014 FCA 95

[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 his Application for Leave to Appeal and Notice of Appeal of January 26, 2016. In response to the AD's request, he made further submissions on July 7, 2016. The Respondent's submissions were also filed with the AD on that date.

[9] On August 15, 2016, the Appellant submitted an MRI of the hypothalamopituitary dated July 18, 2016.

THE LAW

[10] 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.

[11] 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).

[12] 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.

[13] 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

[14] 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 erroneous findings of fact when it stated that:

(i) the Appellant had never been referred to a specialist or taken any medications for his back pain;

(ii) treatments had been successful in shrinking the Appellant's pituitary tumour;

(iii) the Appellant's headaches and dizziness were disabling factors that led to the loss of his driver's license, even though he was not suffering from a severe disability**.**

(c) Did the GD err in law in making its decision by:

(i) failing to apply *Garrett v. Canada* by disregarding the *Villani* factors;

(ii) failing to apply *D'Errico* by disregarding the "regular" aspect of the disability severity test.

SUBMISSIONS

[15] The Appellant's submissions of July 7, 2016 included a lengthy recapitulation of evidence and argument that was before the GD. I will only address those submissions that are germane to the narrow grounds on which the appeal was granted leave.

[16] I am also disregarding the Appellant's submission of August 15, 2016. An appeal to the AD is not ordinarily an occasion on which new medical evidence may be submitted.

(a) What is the appropriate standard of review?

[17] 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.

[18] 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.

[19] 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.

[20] 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*,[4] which it said confirmed that

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

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 a standard of review if it so chooses. 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.

[21] 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) Errors of Fact

(i) Did GD err in finding Appellant had not been treated for back pain?

[22] The Appellant submits that the GD erred in finding that, since he had never been referred to a specialist or taken any medications for his back pain, it was not of such severity that it prevented him from all substantially gainful employment.

[23] The Appellant objects to both the GD member's determinations of fact and the conclusions he based on those facts. In paragraph 33, the GD wrote:

> The Tribunal finds that the Appellant does have back pain however the evidence is clear that while the Appellant has indicated that his back pain has caused him pain he was able to work with that pain and since that time has not pursued any additional advice or treatment from his family doctor or asked to be referred to a specialist. The Tribunal also notes that the Appellant is not taking any medications in order to help assist with his back pain…

[24] In paragraph 35, the GD wrote:

> The Tribunal also finds that the Appellant, while experiencing back pain since 2003 has not explored all the treatments that would be available to him. He currently does not have medications to help deal with his pain and up until he stopped working due to the pituitary tumour he was able to work.

[25] The Appellant insists that he described his use of Oxycocet for back pain in testimony whose credibility was not challenged and cites a specific section of the hearing recording to support this claim.

[26] The Respondent submits that the GD's conclusion was reasonable in the context of the evidence before it. The GD acknowledged that the Appellant had back pain, but found that he was able to work despite that pain and since that time has not pursued any treatment. The Respondent alleges that the recording of the hearing clearly shows that the GD was aware of the medications taken by the Appellant for his back pain.

(ii) Did the GD err in finding treatment to shrink pituitary tumour was successful?

[27] The Appellant submits that the GD made an erroneous finding of fact when it stated at paragraph 35 of its decision that "the treatments that the Appellant received for his pituitary tumour have been successful in shrinking [it]." In fact, the Applicant provided evidence that the tumour was again increasing in size, as documented in a report from Dr. Reddy dated August 27, 2015 and sent to the GD on September 28, 2015.

[28] The Respondent submits that the GD rightly concluded that the Appellant's treatment had been successful in shrinking the pituitary tumour, as was clearly described in Dr. Reddy's December 2011 medical report, which stated that it had been normalized with Cabergoline. The Respondent acknowledges that the GD was aware of the Appellant's testimony in respect of the comparative size of the tumour in 2015, as compared with the medical report from 2011.

(iii) Did the GD err in not finding Appellant disabled despite his loss of license?

[29] The Appellant alleges the GD contradicted itself when it acknowledged in paragraph 31 that headaches and dizziness were disabling factors that led to the loss of his driver's license, yet nevertheless concluded he was not suffering from a severe disability in accordance with CPP criteria.

[30] The Respondent submits that the GD noted the Appellant's complaints of headaches and visual disturbances but found there was no medical explanation for them, nor was there evidence the Appellant had pursued further investigations or treatments. As such, while the GD acknowledged that the Appellant's headaches and dizziness affected him, it found they did not rise to the level of disability as articulated by the CPP.

(c) Errors of Law

(i) Did the GD fail to apply Garrett?

[31] The Appellant alleges the GD failed to apply *Garrett* by inadequately considering the *Villani* factors. While acknowledging that the GD did cite *Villani,* the Appellant argues that it merely recited some of his personal characteristics without discussing whether they impeded his employability in a "real world" context.

[32] The Respondent submits that the GD made no error of law, as it correctly identified the *Villani* test in paragraph 29 of its decision**.** According to *Bungay v. Canada*,[5] a decision-maker must consider factors such as a claimant's age, education level, language proficiency and past work and life experience, but simply failing to name *Villani* does not by itself constitute an error. As the Federal Court of Appeal noted, an error will arise if the *Villani* factors are not considered at all or in any detail. Similarly, *Garrett* held that an error exists when a tribunal fails to cite *Villani* or fails to conduct the analysis in accordance with its principles. Thus, mere oversight in naming *Villani* is not an error when, as is true in this case, all of the *Villani* factors were considered by the decision-maker.

[33] Here, the GD considered the Appellant's age (53 at the time of MQP), his education (Grade 12 completed in Jamaica, along with a two-year working apprenticeship in plumbing) and his work history (as a handyman, house painter, factory worker and courier truck driver). The GD applied the above-named *Villani* elements to the medical evidence and concluded in paragraph 29, "Given his work history, education and training, the Tribunal finds that the Appellant does have transferable skills that would assist him in finding alternate employment."

(ii) Did the GD fail to apply D'Errico?

[34] The Appellant submits that the GD committed an error in law by failing to apply the principle from *D'Errico* that required it to consider how his impairment prevented him from "regularly" pursuing employment, which the Federal Court of Appeal interpreted to mean "consistent frequency." It is alleged that the GD applied the incorrect test for assessing the

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[5] *Bungay v. Canada (Attorney General)*, 2011 FCA 47

severity of a claimed disability when it stated there was no information to suggest the Appellant was prevented from "any" or "all" "substantially gainful employment." Instead, the GD should have asked whether the Appellant was "incapable regularly of pursuing any substantially gainful occupation"—the wording set out in clause 42(2)(a)(i) of the CPP—and considered his evidence that he would not be a reliable employee.

[35] The Respondent submits that the onus is on the Appellant to show that he was incapable regularly of pursuing any substantially gainful employment at his MQP of December, 31, 2013. In this case, the Appellant did not provide evidence that he even attempted to undertake alternate or modified work, whether part-time or sedentary. The Respondent submits that the GD was under no obligation to grapple in any substantive way with the concepts of regularity, reliability and predictability if there was a dearth of evidentiary material before it in that regard. The GD had the benefit of the Appellant's testimony in respect of his ability to regularly pursue substantially gainful employment and found that he failed to discharge the burden of proof and show that he suffered from a severe and prolonged disability.

ANALYSIS

(a) Standard of Review

[36] 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.*[6] 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.

[37] 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.

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

[38] 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."

[39] 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].

[40] 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.

[41] 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) Errors of Fact

(i) Treatment for back pain

[42] The Appellant claims that he testified his back pain was of such severity that it prevented him from most activities. He also insists that he testified he had been prescribed

Oxycocet, a narcotic analgesic. I have listened to the portion of the hearing recording highlighted by the Appellant and find that it essentially corresponds to the Appellant's claims.

[43] Beginning at the 20:00 minute mark, there is a two-minute discussion of the Appellant's back pain, which he said was so intense, it took him a long time to "get going" in the morning. He said that he had been taking it for two-to-2½ years, two tablets three times a day, although its side effects were so unpleasant, he now took it only when he really needed it. There was no mention of this statement in the GD's decision, which did not raise any questions about the Appellant's credibility. If the GD did not overlook this statement but chose not to give it any weight, then there should have been an explanation in the decision.

[44] I find that the Appellant's testimony was not accurately reflected in the GD's categorical statement that he was "not taking any medications in order to help assist with his back pain." It is true, as noted by the Respondent, that the Appellant testified he was previously able to work with back pain, but that does not obviate the GD's error. I also note that the Appellant was last employed in 2011, and it is possible that his back condition had deteriorated since then. My review of the decision and the hearing recording suggests that this was not among the GD's lines of inquiry.

[45] An error or oversight does not, by itself, amount to a valid ground of appeal, as paragraph 58(1)(c) of the DESDA requires that the GD have *based* its decision on the erroneous finding. In the "Analysis" section of its decision, the GD devoted much of paragraph 33 to discussing the Appellant's back pain, finding his testimony on this point unconvincing because he had previously worked through it. Later, in paragraph 35, the GD appeared to draw an adverse inference from its finding that the Appellant had "not explored all the treatments that would be available to him" to address his back pain. This suggests to me that the GD did indeed base its decision, at least in part, on the erroneous finding that the Appellant was not taking any medication for his back pain. For the GD, the Appellant's intake of painkillers was a material issue.

[46] The proper remedy for this error is a new hearing at the GD so that the Appellant can again present his case. For this reason, I will only briefly address the Appellant's other grounds.

(ii) Pituitary tumour

[47] At paragraph 35, the GD made an unqualified finding that the Appellant's treatments for his pituitary tumour had been successful in shrinking it, but the decision made no reference to Dr. Reddy's report of August 27, 2015, which noted: "There may be a small amount of recurrence of the tumour with extension to the left cavernous sinus, but it is not very large."

[48] It was within the discretionary authority of the GD to disregard this report because it was submitted past the applicable submission deadline. However, as I discussed in my Leave to Appeal decision, if the GD declined to admit this report because it was late, it would have been prudent to disclose its reasons for doing so in the decision. I am not suggesting that the GD's failure to do so was unfair or in violation of the principles of natural justice; it is possible that the GD chose to assign the report little weight. If so, it had reason to do so. The report, which was prepared after the MQP, was speculative, and Dr. Reddy heavily qualified his findings, cautioning that there "may" be a "small" amount of recurrence based on comparison with a 2013 MRI, which was of "poor quality." In the end, Dr. Reddy recommended nothing more than further observation.

[49] I note that the Respondent's submissions did not address Dr. Reddy's August 2015 report except to acknowledge its existence. Nonetheless, I am in agreement that on this ground, the GD did not base its decision on an erroneous finding of fact.

(iii) Loss of license

[50] The GD found that the Appellant was not disabled, even though in paragraph 35 of its decision it stated:

> Given that the Appellant had his license taken away due to his headaches and dizziness the Tribunal finds that these issues were and continue to be a disabling factor for the Appellant.

[51] Having carefully reviewed the decision and the hearing recording, I have concluded there is no merit in this ground. I agree with the Respondent's submission that the GD was within its jurisdiction to find that the Appellant's headaches, dizziness and visual disturbance did not rise to the level of a disability as defined by the CPP. The GD found that these issues were "a disabling factor," but that is not the same thing as a "severe and prolonged" disability that

regularly prevents substantially gainful employment. Further proof that the GD did not contradict itself is found at paragraph 10 of the GD's decision, in which it was noted that a September 2010 endocrinology report relayed the Appellant had had no further difficulties with his vision, and he was able to get his truck driver's license reinstated.

(c) Errors of Law

(i) Garrett

[52] The Appellant alleges that the GD merely recited the "real world factors" principle from *Villani* without actually applying it to his personal characteristics and medical impairments. In my Leave to Appeal decision, I saw an arguable case on this ground, as it remained an open question at that point how a person of the Appellant's background might have been able to carry on working with symptoms acknowledged to be "disabling." However, as I have determined the GD was justified in deeming headaches and dizziness as mere "disabling factors" that fell short of "severe and prolonged," its analysis of the Appellant's employability in a "real world" context now appears to stand on more solid ground.

[53] As noted by the Respondent, the GD made what appears to be a genuine attempt to consider the Appellant's capabilities given his education, background and experience. In the end, it determined that his varied work experience gave him some transferrable skills that would permit him to continue working in some capacity, despite his many medical conditions. As the GD took the Appellant's personal circumstances into account, I would not interfere with its assessment.

(ii) D'Errico

[54] The Appellant objects to two instances in the GD's decision where it allegedly misstated the "severity" requirement for disability benefits under subparagraph 42(2)(a)(i) of the CPP: Paragraph 32, in which it said there was no evidence that the Appellant "was prevented from *any* substantially gainful employment," and paragraph 33, in which it said the Appellant "did not have back pain that would prevent him from *all* substantially gainful employment [my emphasis]."

[55] I agree that, in these paragraphs, the GD misstated the test, which demands consideration of whether an applicant was "incapable regularly of pursuing any substantially gainful occupation." Although the test was correctly stated in paragraph 5 of its decision, the issue here is whether, in substance, the GD applied the correct test and made a genuine attempt to grapple with whether the Appellant was "regularly" able to pursue employment.

[56] The Respondent is right to say that the onus was on the Appellant to show that he was incapable regularly of pursuing any substantially gainful occupation, but I disagree with its submission that there was a "dearth" of evidence about the Appellant's capacity to pursue regular employment. In my view, there were medical reports that documented a variety of conditions that had the potential to interfere with the Appellant's ability to pursue the types of work for which he was qualified, and there was the Appellant's own testimony, in which he told the GD that back pain and visual disturbances twice forced him off his driving job. It is not my role here to assess that evidence, but however inadequate it may have been, the GD was not relieved of its responsibility to give it meaningful consideration using the correct severity test.

[57] Did the GD discharge its responsibility in this case? The regularity concept has been explored in numerous decisions, recently in *Atkinson v. Canada*,[7] where the Federal Court of Appeal stated that "predictability is the essence of regularity within the CPP definition of "disability." My review of the GD's decision suggests that, having twice misstated the test, it did not properly address whether the Appellant's symptoms—principally back pain, headaches, dizziness and visual disturbances—prevented him from regularly, predictably or reliably attending a job in the competitive labour market.

[58] In finding that the Applicant retained work capacity at the time of his MQP, the GD failed to incorporate the regularity concept into its assessment. For this reason, I am allowing the appeal on this ground.

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[7] . *Atkinson* v. *Canada (Attorney General)* 2014 FCA 187

CONCLUSION

[59] For the reasons discussed above, the appeal succeeds on two of the five grounds for which leave was allowed.

[60] Section 59 of the DESDA sets out the remedies that the AD can give on appeal. To avoid any 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 GD member.

Member, Appeal Division