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

Citation: *L. R. v. Minister of Employment and Social Development,* 2016 SSTADIS 333

Tribunal File Number: AD-16-183

BETWEEN:

L. R.

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 25, 2016

Canada

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 28, 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), prior to her minimum qualifying period (MQP) of December 31, 2017. 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 27 years old when she submitted an application for CPP disability benefits in November 2012. She indicated that she is a high school graduate and has certifications as a personal support worker and medical office assistant. She was last employed as food and beverage supervisor in a hotel, a position she held from December 2011 to May 2012, when she claimed that she was no longer physically able to do the job.

[3] In the questionnaire accompanying her CPP application, the Appellant listed a variety of medical conditions that she claimed prevented her from working, among them, irritable bowel syndrome, interstitial cystitis, hiatus hernia, fibromyalgia, anxiety and panic attacks and insomnia. She reported pain and restrictions that made it difficult for her to sit, stand or walk for even brief periods. She said she was unable to bend, reach, lift or carry. She said she had been seen and treated by numerous specialists but claimed there had been no appreciable improvement in her pain or functionality.

[4] At the hearing before the GD on September 14, 2015, the Appellant testified that her impairments prevented her from engaging in routine physical activities such as driving,

gardening or playing on the computer. She said that she suffered from widespread pain, extreme memory loss, numbness and tingling in her arms, legs, face, neck, back and feet. She has also complained of blurred vision and severe eye pain, extreme fatigue, chronic bladder infections and stomach cramps. She said she was not up to the physical demands of any job and did not believe there was any medication that could improve her condition.

[5] In its decision, the GD found that the Appellant's disability fell short of the requisite severity threshold, noting that none of her specialists had reported any severe diagnostic findings. It also found that the Appellant had not complied with treatment recommendations and had not offered a reasonable explanation for why she refused to take prescription medications. While the GD acknowledged that Appellant had some documented medical issues, it was not persuaded that they precluded her from regularly pursuing any substantially gainful occupation, given her relative youth and good education.

[6] On January 20, 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 ground that the GD may have based its decision on erroneous findings of fact, specifically that :

(a) The Appellant had never been prescribed medical marijuana;

(b) The Appellant was non-compliant with treatment and made no submissions as to why she refused to take prescribed medication;

(c) The Appellant had not been referred to a psychiatrist or prescribed medication to deal with her mental health conditions.

[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 20, 2016. In response to the AD’s request, she made further submissions on July 5, 2016. The Respondent’s submissions were filed with the AD on July 8, 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 erroneous findings of fact when it stated that:

(i) The Appellant had never been prescribed medical marijuana;

(ii) The Appellant was non-compliant with treatment and made no submissions as to why she refused to take prescribed medication;

(iii) The Appellant had not been referred to a psychiatrist or prescribed medication to deal with her mental health conditions.

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 (Minister of Citizenship and Immigration) v. Huruglica,* 2016 FCA 93,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 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.

[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) Errors of Fact

(i) Did GD err in finding Appellant never been prescribed medical marijuana?

[19] The Appellant objects to paragraph 43 of the GD's decision, which reads:

> At the hearing of this appeal, the Appellant testified that she manages her symptoms with marijuana. The medical records on file indicated that she has no prescription for marijuana. In fact, her family physician Dr. Arora and Dr. Price (a specialist) both refused to prescribe medical marijuana for the Appellant. This implies that the Appellant is currently using recreational or none [sic] prescribed marijuana. Despite the Appellant's use of marijuana there is no report as to the effectiveness or lack of effectiveness of the marijuana. The Appellant however did testify that it improves her functionality and helps with pain.

[20] The Appellant denies this statement and points to a February 19, 2013 entry in her family doctor's clinical notes (p. GD4-94), in which Dr. Arora wrote:

> Patient has gotten into a specialist to discuss medical marijuana. She will be seeing Dr. Ira Michael Price. She is requesting copies of her medical diagnosis as Dr. Price needs them. Can you print these/ let us know what to print? Please advise.

[21] A notation on February 19, 2013 indicated that a referral was made.

[22] The Appellant also points to Dr. Arora's entry dated July 3, 2013, in which he stated that she had been approved for medical marijuana use.

[23] The Appellant submits that not only was evidence of her referral to a medical marijuana specialist easily accessible in the file, she also testified to similar effect during her hearing, including details such as the manner in which she consumed the drug, its dosage and the precautions she took. As the GD raised no issue about the Appellant's credibility, it had no basis to allege that she was using recreational or non-prescribed marijuana.

[24] The Respondent submits that the GD was correct in concluding that neither Dr. Arora nor the Appellant's rheumatologist wanted to prescribe her with medical marijuana. This conclusion had a basis in the evidence of the clinical notes on file.

[25] In a clinical record dated November 9, 2012, Dr. Arora noted that he had a discussion with the Appellant about using medical marijuana. He stated that she was free to give him the contact information of a doctor that would prescribe it, but he "didn't feel it was the right step prior to trying better options." In paragraph 28 of its decision, the GD noted that, according to clinical notes dated February 5, 2013, the Appellant's rheumatologist refused to make a referral to a medical marijuana specialist after reviewing her file.

[26] The Respondent maintains there is no evidence that medical marijuana was ever prescribed to the Appellant by either of these doctors. The report dated February 19, 2013 indicates that the Appellant discussed the matter with a specialist, but there is nothing in the evidence to show that medical marijuana was in fact prescribed to her.

[27] Finally, the July 11, 2013 record is merely a transcription of a progress note from the Appellant's social worker. The note refers to marijuana, but it merely indicates what the Appellant told her counsellor about it. It does not confirm that medical marijuana had in fact been prescribed to her.

(ii) Did the GD err in finding the Appellant was non-compliant with treatment?

[28] The Appellant submits that the GD based its decision on an erroneous finding of fact when its stated at paragraph 44 of its decision:

> The Tribunal is mindful that an applicant for a disability pension is obligated to abide by and submit to treatment recommendations and, if this is not done, the applicant must establish the reasonableness of his/her compliance (*Bulger v. MHRD* (May 18, 2000) CP 9164). No submission was made as to why the Appellant refuses to take prescribed medication. She has been counselled by her treating physicians but she continues to be none [sic] compliant preferring instead to use marijuana for which she has no prescription and whose use is not monitored or managed by her treating physicians.

[29] The Appellant denies that she was non-complaint with treatment recommendations. She claims that she gave evidence during the hearing that she had tried medications that were recommended by her treating practitioners but stopped taking them after experiencing detrimental and debilitating side effects. There is no basis to assert that the Appellant refused to take prescribed medications without explanation. The Appellant offered an explanation during her oral testimony, which can be found at 57:00 of the hearing recording.

[30] The Respondent submits that the GD did not err in finding that the Appellant was non-compliant with prescribed medications. In order to meet the definition of severe and prolonged, a claimant must follow his or her physician's treatment recommendations. A claimant who unreasonably refuses to submit to recommended treatment disentitled to receive a disability pension (*Lalonde v. Canada (Minister of Human Resources Development),* 2002 FCA 211).

[31] In paragraph 44 of its decision, the GD discusses the Appellant's obligation to follow her physicians' recommendations. The GD then notes that the evidence on the record shows that the Appellant did not follow the advice of her treatment providers or work with them to find alternative treatment. Instead, she used her own methods to deal with her various ailments.

[32] On March 23, 2011, Dr. Arora noted that Dr. Kim relayed the Appellant "did not take any Elmiron for fear of side effects." In November 2012, the Appellant told Dr. Arora that she did not want to "take any medications chronically" and instead wanted a prescription for medical marijuana. Furthermore, in the Appellant's reconsideration request of April 13, 2013, she disclosed that she had started a "natural treatment," which made her feel more comfortable than prescription medication.

[33] Finally, in her oral testimony, the Appellant indicated that after being diagnosed of generalized anxiety, obsessive-compulsive disorder and bipolar disorder, she was advised by her doctor to seek treatment of a psychiatrist and take medications. The Appellant indicated that she refused to try these treatment suggestions.

[34] The Respondent submits that the evidence clearly shows the Appellant did not follow the treatment suggestions of her doctors and offered no submissions as to why her refusal was reasonable.

(iii) Was the Appellant referred to a psychiatrist or prescribed psychotropic medications?

[35] The Appellant alleges the GD made an erroneous finding of fact in paragraph 48 of its decision when it stated:

> Apart from physical impairments, the Appellant has been diagnosed with anxiety and depression for which she was referred to a social worker in 2011 and for which she attended counselling sessions. There is no indication that she has been prescribed medication to deal with her mental health conditions or been referred to a psychiatrist for consultation or treatment.

[36] The Appellant refers to several instances in the case file where it indicated she was prescribed medications for her mental health, among them reports from Dr. Giles (p. GD4-50) and Dr. Arora (p. GD4-75 and p. GD4-85). While the Appellant acknowledges that she was not referred to a psychiatrist, she was assessed by a psychologist, Dr. Paulitzki, in July 2014, who stated that her presentation was consistent with generalized anxiety, obsessive-compulsive disorder and likely bipolar processes (type I or II) with some psychotic features.

[37] The Respondent submits that the GD did not err when it found the Appellant had not been referred to a psychiatrist or prescribed psychoactive medication. When paragraph 48 is read as a whole, and the context in which the GD drew its conclusion examined, it is evident that there was no erroneous finding of fact.

[38] A claimant bears the onus of proving that he or she suffers from a severe and prolonged disability prior to his or her MQP. In its decision, the GD stated there was no indication that the Appellant had been prescribed medication for mental health conditions or been referred to a psychiatrist. However, the sentence immediately preceding this conclusion referred to the fact

that she had been diagnosed in 2011 with anxiety and depression, for which she attended counselling sessions.

[39] In her testimony before the GD, when asked about her 2014 consultation, in which she diagnosed with generalized anxiety, obsessive-compulsive disorder and bipolar disorder, the Appellant conceded that she had never seen a psychiatrist and did not take medications for her mental health condition. She testified that she did a lot of meditating at home to help with her stress and anxiety until it got to a point where she needed to be hospitalized. She said that she was going to try to control her mental health condition using natural methods.

ANALYSIS

(a) Standard of Review

[40] 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,* [2008] 1 SCR 190, 2008 SCC 9. 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.

[41] 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.

[42] 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."

[43] 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].

[44] 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.

[45] 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) Medical Marijuana

[46] The Appellant submits that the GD incorrectly found that she had never been prescribed medical marijuana. In its decision, it disputed the GD's statements that: (i) the records on file indicated no prescription for medical marijuana; (ii) Dr. Arora and Dr. Price both refused to prescribe her with medical marijuana and (iii) given the foregoing findings, any use of marijuana on her part was not monitored or managed by her treating physicians.

[47] The Appellant cited records dated February 19, 2013 (GD4-94) and July 3, 2013 (GD4-98) to support her claim that she had in fact been prescribed medical marijuana, but a close examination of these passages from Dr. Arora's clinical file shows only that she had attended an appointment with Dr. Price. The outcome of that appointment is unclear, and I see no report on file from Dr. Price to confirm that he approved her for medical marijuana. I note that Dr. Arora's July 3, 2013 notes make no reference to marijuana, although the next entry—a July 11 transcription of Ruth Ann McBride's progress report—does, but, as noted by the Respondent, it merely relays what the Appellant told her counsellor. It does not constitute an independent confirmation that she was in fact prescribed medical marijuana.

[48] I have reviewed the transcript of the hearing recording prepared by the Respondent. The Appellant testified before the GD that she saw Dr. Price, her medical marijuana doctor, every three months. While the Appellant implies that she had been prescribed medical marijuana, she and her representative conceded that they did not produce a report from Dr. Price confirming said prescription.

[49] Based on my review of the record, I must conclude that the GD was strictly correct to conclude that the file did not indicate the Appellant had a prescription for marijuana. However, the GD went further and declared that both Dr. Arora and Dr. Price had *refused* to prescribe medical marijuana.

[50] While Dr. Arora's November 9, 2012 clinical note clearly indicated that he refused to prescribe medical marijuana to the Appellant, there was no evidence that Dr. Price followed suit. Indeed, as has already been established, there was no direct evidence of Dr. Price's engagement with the Appellant one way or the other. There was, however, evidence of another specialist's refusal to prescribe medical marijuana—Dr. Arora's February 5, 2013 note that the Appellant's rheumatologist had decided not to apply for medical marijuana after "reviewing paperwork." The GD evidently confused this unnamed rheumatologist with Dr. Price (who appears to be a general practitioner who represents himself as an authority on medical marijuana).

[51] While the GD may have made a mistake, I find it immaterial. The larger point that the GD was attempting to make remains true—two medical practitioners evidently refused to prescribe the Appellant with medical marijuana. In the absence of any concrete evidence to the

contrary, the GD was within its authority as trier of fact to make a reasonable inference that the only way the Appellant could have been medicating her symptoms with marijuana was through use of its recreational variant.

[52] For these reasons, I find that the GD did not base its decision on an erroneous finding of fact. The Appeal does not succeed on this ground.

(ii) Non-compliance

[53] The Appellant submits that the GD committed an error of fact when it stated that she refused to take prescribed medications without reason, when there was both oral and written evidence that she did take them but, due to debilitating side effects, chose not to continue.

[54] It is clear that the GD based its denial, at least in part, on what it found was the Appellant's non-compliance with treatment recommendations. The issue here is whether that finding amounted to an appealable error. As noted by the Respondent, the record shows that the Appellant refused, or expressed reluctance, to take prescription medications on several occasions, preferring to manage her symptoms with marijuana. I allowed leave on this question because the GD stated at paragraph 44 of its decision that the Appellant made "no submission" on her avoidance of prescribed medications, when it appears she did make an attempt to explain herself.

[55] In paragraph 12, the GD noted the Appellant's testimony that she has "tried many medications but gets sick to the stomach." The hearing recording confirms that there was a discussion about why the Appellant did not take prescription medications. In response to questioning, she denied suggestions in the medical reports that she had never tried some medications and insisted she had given them all a chance, but they made her sick. Tylenol #3, Ativan and Lyrica all produced unpleasant side effects. Marijuana and meditation were the only things that she found worked.

[56] I note that neither the Appellant nor the Respondent disagrees that insufficient medical mitigation may be a valid reason to deny a claim for CPP disability benefits. In this case, the GD (in paragraph 44) correctly stated that the Appellant was obligated to submit to treatment recommendations and, if this was not done, establish the *reasonableness* of her non-compliance.

I have emphasized the word “reasonableness” here because it preceded the GD’s finding that the Appellant made “no submission” on her refusal to take medications. Reading the paragraph in its entirety suggests that the GD intended to say that the Appellant made “no *reasonable* submission” to explain her non-compliance with treatment recommendations. There is no doubt that a recurrent theme in many of the medical reports was the Appellant’s reluctance to follow the advice of her treatment providers, and this was reflected in the GD’s summary of the evidence and its analysis of that evidence.

[57] The GD was within its jurisdiction to assess the Appellant’s rationale for not taking her prescribed medications and to determine whether or not it was justified. While I agree that the GD should have been more explicit in explaining why it found the Appellant’s actions unreasonable, this deficiency, in my view, is not sufficient grounds to allow the appeal. If there was an error here, it was not “capricious or perverse” or “without regard for the material.”

(iii) Psychiatric referral and psychoactive medications

[58] The Appellant identifies two errors in paragraph 48 of the GD’s decision. She acknowledges that, while she has never seen a psychiatrist, she has consulted other mental professionals over the years. She also denies that she had not been prescribed medication to deal with her mental health conditions, referring to prescriptions for Ativan, Elavil, Cymbalta and Amitriptyline.

[59] As the Appellant conceded that she had never seen, or been referred to, a psychiatrist, I will say no more on this matter except to note that the fact she has received counselling from a social worker and psychologist does not make the GD’s finding any less accurate.

[60] Having reviewed Dr. Arora’s notes, I am satisfied that the Appellant was in fact prescribed antidepressants and anti-anxiety medication. In isolation, the GD’s statement that there was “no indication” she had been prescribed psychoactive drugs was incorrect. However, the Respondent suggests that its meaning emerges only if it is read in context.

[61] I agree that context is important. The two sentences that comprise paragraph 48 address the Appellant’s first mental health diagnosis in 2011. Read together, they suggest the GD was making the point that the Appellant received only minimal intervention following her diagnosis.

[62] The Appellant’s testimony indicates that, while she may have been urged to take psychoactive medication, she declined to take it. She was asked what prescription medications she was taking for anxiety, depression and bipolarity, to which she replied “none.” At the prompting of her representative, the Appellant said that she had tried Lyrica and Ativan but they caused nausea and outbursts.

[63] The record suggests that the GD was aware that the Appellant had been prescribed medication for her mental health issues but placed more weight on its finding that she was unreasonably refusing to take them in favour of non-recommended therapies. It was open to the GD as finder of fact to weigh the available evidence and make inferences about the severity of her claimed impairments from the treatments she was receiving—or not receiving.

[64] The courts have previously addressed this issue in other cases where it has been alleged that administrative tribunals failed to consider all of the evidence or placed inappropriate weight on selected items of evidence. In *Simpson v. Canada (Attorney General),* 2012 FCA 82, the appellant’s counsel identified a number of medical reports which she said that the Pension Appeals Board—the predecessor to the AD—ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> First, a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence. Second, assigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact….

[65] I see no merit in this ground.

CONCLUSION

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

Member, Appeal Division