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

Citation: *M. H. v. Minister of Employment and Social Development,* 2016 SSTADIS 324

Tribunal File Number: AD-15-1583

BETWEEN:

M. H.

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 October 6, 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, 2012. 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 55 years old when he submitted an application for CPP disability benefits in September 2011. He completed high school and a six month post-secondary program. He worked for approximately 30 years in projection molding, first as a technician, then a supervisor. He left work in 2006 due to a neck injury and subsequent discectomy. He returned to work in 2007, completing light and supervisory duties until the company closed in 2009.

[3] In the questionnaire accompanying his CPP application, the Appellant claimed numerous functional limitations, including pain and stiffness in his neck and right shoulder and numbness in his right hand. He suffered from blackouts, dizziness and nausea and had been admitted to hospital many times. 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 hearing before the GD in October 2015, the Appellant testified that that he was disabled by a combination of physical conditions, among them cervical spondylosis, post-operative lumbar pain, type 2 diabetes, gastro-esophageal reflux, arthritis and depression. After being laid off, he took a course to be a real estate agent, but did not complete it because pain

prevented him from concentrating. He applied for light duty jobs and jobs in fields where he had experience but was not hired.

[5] In its decision dated October 6, 2015, the GD found that the Appellant's disability fell short of the requisite severity threshold, in part because none of his doctors stated that he was unable to work in any employment. While the GD accepted that the Appellant had limitations regarding his neck and right shoulder at the MQP, it was not persuaded that this precluded him regularly from pursuing any substantially gainful occupation. The GD also found that the Appellant had not made sufficient effort to mitigate his impairments by finding alternative employment more suitable to his limitations.

[6] On December 17, 2015, 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:

(a) breached a principle of natural justice by neglecting to consider Dr. Greenstone's October 2012 note;

(b) based its decision on an erroneous finding of fact without reference to the material before it when it found that narcotics are commonly indicated in chronic pain cases.

[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 December 17, 2015. Further submissions were made on April 18, 2016 and June 13, 2016. The Respondent's submissions were also filed 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.

ISSUES

[10] 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 breach a principle of natural justice by failing to consider Dr. Greenstone's October 2012 letter?

(c) Did the GD base its decision on an erroneous finding of fact when it stated that narcotics were typically prescribed in chronic pain cases?

SUBMISSIONS

[11] The Appellant's submissions of June 13, 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.

(a) What is the appropriate standard of review?

[12] 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.

[13] 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.

[14] The Respondent's submissions discussed in comprehensive detail the standards of review and their applicability to this appeal, concluding that a standard of correctness was to be applied to errors of law, and reasonableness was to be applied to errors of fact and mixed fact and law.

[15] 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 a standard of review if it so desires. 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.

[16] 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.

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

(b) Did GD breach natural justice by failing to consider Dr. Greenstone's letter?

[17] The Appellant alleges that the GD failed to observe a principle of natural justice or acted beyond its jurisdiction in not taking into account Dr. Greenstone's October 2012 note. It cited the Supreme Court of Canada in *Oakwood Developments Ltd. v. St. Francois Xavier (Rural Municipality)*,[2] in which it was held that "the failure of an administrative decision-maker to take into account a highly relevant consideration is just as erroneous as the improper importation of an extraneous consideration."

[18] The GD found that the Appellant was capable of some work at the time of the MQP, but this was directly contradicted by evidence within the record, most obviously by Dr. Greenstone, who wrote in October 2012 that the Appellant was "being referred to orthopedics for persistent right shoulder pathology which prevents him from working." This note, which was written during the MQP and is highly relevant, was ignored by the GD.

[19] The Appellant submits, in the alternative, that if the GD did consider Dr. Greenstone's note, then the GD exceeded its jurisdiction in having failed to explain why it found the note unreliable or biased. In the prior AD decision *Minister of Employment and Social Development v. K.O.*[3] (coincidentally authored by the same member who decided the Appellant's case at the GD level), a decision was found unreasonable on the ground that the reasons given were insufficient. *K.O.* relied on the Supreme Court of Canada case *R. v. Sheppard*,[4] in which Mr. Justice Binnie wrote that judges must provide reasons for their decisions that are complete enough to allow appellate bodies to evaluate their reasoning.

[20] While a prior AD decision carries only persuasive weight, the *Sheppard* principle has binding authority. The Appellant submits that the GD, as it did in *K.O.*, exceeded its jurisdiction in failing to explain why it assigned little or no weight to contradictory evidence.

[21] The Respondent acknowledges that the GD did not apparently consider Dr. Greenstone's October 2012 note but submits that the GD was under no obligation to refer to it in any event. It is trite law that a tribunal need not refer in its reasons to each and every piece of evidence

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[2] *Oakwood Developments Ltd. v. St. Francois Xavier (Rural Municipality)*, [1985] 2 SCR 164
[3] *Minister of Employment and Social Development v. K.O.,* 2015 SST AD
[4] *R. v. Sheppard,* 2002 SCC 26

before it but is presumed to have considered all the evidence. In this appeal, what matters is that the GD did consider the medical evidence around the Appellant's MQP of December 31, 2012, including medical evidence both prior to and well after the MQP.

[22] The Respondent submits that the GD did not breach a principle of natural justice by not referencing Dr. Greenstone's October 2012 note, which was a short notation handwritten on prescription pad as follows: "[H]e is being referred to orthopedics for persistent right shoulder pathology, which prevents him from working." The note does not provide a formal diagnosis, nor is it a detailed assessment of Dr. Greenstone's opinion on the Appellant's long-term condition. Moreover, the GD did consider Dr. Greenstone's more fulsome assessment of the Appellant's shoulder in January 2012.

[23] Paragraph 10 of the GD's decision refers to Dr. Greenstone's report of January 10, 2012, which observed that the Appellant suffered from pain in the right shoulder and arm that interfered with driving and lifting. While not identical to the October 2012 note, this report is broadly consistent with it and does consider the Appellant's right shoulder pain and its impact on his ability to undertake certain tasks. The GD's consideration of the January 2012 report suggests that it was aware of the Appellant's complaints of pain and limitations in his right shoulder. The GD cannot be said to have breached natural justice in disregarding the October 2012 note when it considered the substance of a more detailed report prepared by the same author earlier in the year.

(c) Did GD base its decision on a finding that narcotics are prescribed for chronic pain?

[24] The Appellant alleges the GD based its decision on an erroneous finding of fact when it found that narcotics were not typically prescribed in chronic pain cases.

[25] The Appellant cited a prior decision of the AD, *K.S. v. Minister of Employment and Social Development*,[5] which analyzed the language of a GD decision to determine whether it contained errors of fact. There, the GD had written that "the appellant had made no effort to obtain employment 'not precluded by any functional limitations.'" The AD found that the use of the word "not" saved the statement from being in error as there existed on record evidence of

[5] *K.S. v Minister of Employment and Social Development,* 2015 SSTAD 234

some attempts by the appellant in that case to find employment. *K.S.* shows there is precedent within the AD for precise and mechanical analysis in the course of evaluating alleged errors.

[26] The Appellant suggests that two interrelated errors of fact are found in paragraph 24:

> Of note, the Appellant did not testify and there was no medical evidence that any doctor had recommended that he take narcotic medication that is commonly seen in chronic pain cases.

[27] First, the statement that there was no medical evidence of prescribed narcotics is a flagrant error. There are numerous references in the record to the Appellant taking Tylenol #3 to manage his pain, and the Appellant took Percocet at the direction of a doctor. Both of these medications are considered by Health Canada to be narcotics. Second, the statement that narcotic medication is commonly seen in chronic pain cases is not supported by any of the evidence on record for this file.

[28] The Appellant further submits that, while these errors of fact may appear minor, they go to the heart of the GD's analysis. Implicit in the GD's reasons was its view that the Appellant did not look like a typical chronic pain patient. That the AD believedthe Appellant's supposed non-use of narcotic pain relievers significant was conveyed by its choice to preface the statement with the words "of note." Since this was a finding of fact that had no basis in the evidence, and since that finding formed part of the analysis supporting the AD's decision, the Appellant submits that the error should warrant the allowing of the appeal. Without this error the outcome might have been different.

[29] The Respondent submits that paragraph 24 of the decision made it clear that the GD noted "the Appellant continues to suffer from pain, which was treated with prescription medication." This was the same prescription medication that the Appellant testified that he continued to take at the time of his hearing. This information corresponded with the earlier paragraphs 9(b) and (c) and 13, which described the Appellant as being treated with over-the-counter cream and Tylenol #3.

[30] While the GD found the Appellant was prescribed with these prescription medications and was in fact taking them, it did state, in obiter, that narcotics (medication stronger than

Tylenol #3) are commonly prescribed to persons suffering from chronic pain. The Respondent argues that the GD drew no adverse inference from the obiter comment.

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.*[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.

[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 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

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

> 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. Greenstone's Letter

[37] The Appellant alleges that the GD breached a principle of natural justice by failing to consider Dr. Greenstone's October 2012 note declaring him unable to work. The Respondent concedes that the GD apparently overlooked the note, but submits that a decision-maker need not refer to each and every item of evidence before it and, in any case, the substance of Dr. Greenstone's assessment was covered in his earlier letter of January 2012, which was considered by the GD.

[38] As discussed in my Leave to Appeal decision of April 29, 2016, omitting reference to an item of evidence in a decision does not, by itself, amount to a breach of natural justice, as it remains the right of the finder of fact to assess the quality of the evidence and assign it appropriate weight. The question that remains is whether Dr. Greenstone's letter was relevant and material to the outcome.

[39] As noted, Dr. Greenstone's note was brief and written by hand on a prescription pad. It did little more than refer to "persistent right shoulder pathology which prevents [the Appellant]

from working." While it may have been brief and easily overlooked, it was nevertheless the only unequivocal statement from any of the Appellant's doctors that he was no longer capable of employment. The note was made only more relevant by the fact that it was written three months prior to the end of the MQP by the Appellant's long-time family physician, who was the only one of his many treatments providers in a position to take a global view of his many conditions.

[40] In my view, it is not enough to find that Dr. Greenstone's note was relevant. In order for the appeal to succeed on this ground, it must also have been material—that is to say, the GD's decision must have hinged on whether or not Dr. Greenstone's note was given due consideration. On this issue, I must find in favour of the Appellant. The GD clearly based its decision, at least in part, on the erroneous finding that none of the many medical reports produced by the Appellant barred him from working. In neglecting to take into account the one report—however brief—that did rule out work, I find that the GD committed a breach of natural justice.

[41] The thrust of the Respondent's argument was that Dr. Greenstone's note was essentially immaterial in that it did not provide a formal diagnosis, nor did it set out a detailed assessment of the Appellant's long-term condition, in contrast to Dr. Greenstone's "more fulsome" assessment of the Appellant's shoulder dated January 10, 2012.

[42] It is true that the GD took this earlier report into account, noting in paragraph 10 of its decision that the Appellant suffered from pain in the right shoulder and arm that interfered with driving and lifting. However, the GD was already aware of the Appellant's shoulder complaints from other reports, and it cannot be said that the January 2012 letter was much more comprehensive than the disputed October 2012 note: It too was handwritten and offered only the briefest of analyses, which I reproduce here in full:

> He is having more pain on right side of neck and right shoulder from the right arm interfering with driving and lifting things. You have his MRI. He has cervical spine disease and x-ray showed some AC problems and shoulder so when ultrasound is booked. A referral to Dr. Gittens has been made.

[43] I must disagree with the Respondent that the contents of this letter encompassed the October 2012 note. While the January 2012 letter touched on pain and limitation in the

Appellant's right shoulder, it did not specifically address his ability to work. However casual its presentation and terse its analysis, the October 2012 note should have been addressed in the GD's decision. If it was disregarded or given negligible weight, the GD should have explained why it chose to do so.

(c) Narcotics prescribed for chronic pain

[44] The Appellant submits that the GD found, against the available evidence, that he had not been prescribed narcotics. The Appellant also alleges that the GD incorrectly found that narcotics are not typically prescribed in chronic pain cases.

[45] At paragraph 24 of its decision, the GD wrote that there was "no evidence any doctor had recommended that he take narcotic medication." The Appellant disputed this finding, mentioning several reports that documented his use of narcotic painkillers, but Dr. Telfer and Dr. Gittens merely relayed the Appellant's history and did not prescribe or recommend Tylenol #3 themselves. The Appellant also cited other documents, including his CPP disability questionnaire and the letter of November 25, 2014, but they were prepared by the Appellant himself, who reported, without any independent confirmation, that he was taking Tylenol #3. Finally, the Ambulatory Care Report, which purportedly prescribed the Appellant with Percocet, was completely illegible in the document record, and offered no evidence one way or another. Finally, I note that the remainder of the medical record, including the CPP medical report completed by the Appellant's family physician, listed many prescription medications but there was no mention of any narcotic. Based on the foregoing, I must conclude that the GD was strictly correct in stating that there was no objective medical evidence of any recommendation that the Appellant take narcotics.

[46] Nevertheless, having noted the lack of any evidence that the Appellant was prescribed narcotics, the GD then appeared to draw a negative inference from that fact, based on their common use in chronic pain cases. As noted in my Leave to Appeal decision, it is not obvious to me that narcotics are "commonly" indicated or used in chronic pain cases, and the GD did not cite any evidence or authority for this premise. I also note that the Respondent did not argue before the GD that the absence of a certain class of painkillers from the Appellant's drug regime suggested his impairments fell short of the severity threshold. In my view, the GD's attempt to

link severity to narcotics use was unsupported by the evidence and constituted an erroneous finding of fact without regard to the material before it.

[47] Of course, an erroneous finding of fact by itself is not necessarily a valid ground of appeal; under paragraph 58(1)(c) of the DESDA, the GD must have *based* its decision on that erroneous finding of fact. It was one thing for the GD to find that non-use of narcotic painkillers implied a non-severe impairment, but it was another for that finding to significantly influence its final decision. In this case, there were two clear indications that the GD considered the Appellant’s narcotics intake (or lack of it) to be material—its inclusion of the subject in the analysis in the first place and its use of the words “of note” to introduce it.

[48] The Respondent argued that the GD did find that the Appellant had taken narcotic painkillers, but in support it cited passages (paragraphs 9(b) and (c) and 13) that merely repeated the Appellant’s unsupported claims. It remains a fact that the GD later stated in paragraph 24 that there was no evidence a doctor had recommended narcotics, and the Respondent’s attempt to dismiss this statement as obiter (made in passing) defied both its substance and the context in which it was made. Contrary to the assertion of the Respondent, I find that the GD did draw an adverse inference from an erroneous finding of fact, warranting the appeal to be allowed on this ground.

CONCLUSION

[49] For the reasons discussed above, the appeal succeeds on both grounds for which leave was allowed.

[50] 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