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

Citation: *F. V. v. Minister of Employment and Social Development*, 2016 SSTADIS 432

Tribunal File Number: AD-16-193

BETWEEN:

**F. V.**

Appellant

and

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

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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DECISION BY: Neil Nawaz

HEARD ON: October 24, 2016

DATE OF DECISION: November 4, 2016

Canada

## REASONS AND DECISION

## DECISION

The appeal is allowed.

## PERSONS IN ATTENDANCE

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|---|---|
| Appellant | F. V. |
| Representative for the Appellant | Bordena Kordasiewicz |
| Professional interpreter of Portuguese | Paula Amaral |
| Representatives for the Respondent | Naadiya Atcha |
| | Faisa Ahmed-Hassan (observer only) |

## INTRODUCTION

[1] This is an appeal of the decision of the General Division (GD) of the Social Security Tribunal (SST) issued on October 29, 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, 2009. Leave to appeal was granted on May 31, 2016, on the grounds that the GD may have erred in rendering its decision.

## OVERVIEW

[2] The Appellant was 55 years old when she applied for CPP disability benefits on February 12, 2013. In her application, she disclosed that she received the equivalent of a Grade 9 education in Portugal, her country of origin. She immigrated to Canada when she was 17 and worked in a hospital from 1997 to 2004, when she was involved in motor vehicle accident (MVA). She was most recently employed in the cafeteria at Conestoga College, a job she held from August 2008 to May 2009.

[3] The Respondent denied the application at the initial and reconsideration levels on the grounds that her disability was not severe and prolonged as of the MQP date. On November 15, 2013, the Appellant appealed these denials to the GD.

[4] At the hearing before the GD on October 27, 2015, the Appellant testified about her education and work experience. She said that she was healthy until the MVA, which left her with pain in her shoulder, right arm, neck and back, as well as depression. After being out of the workforce for four years, she took a kitchen job washing dishes, cleaning equipment and loading trays. She indicated that she experienced pain and had trouble keeping up with her duties at work.

[5] In its decision of October 29, 2015, the GD dismissed the Appellant's appeal, finding that, on a balance of probabilities, she was capable of substantially gainful employment. The GD found insufficient objective medical evidence to show a severe disability as of the MQP. It also detected inconsistencies in the Appellant's evidence and found her testimony unreliable.

[6] On January 26, 2016, the Appellant's representative filed an application for leave to appeal with the Appeal Division (AD) of the SST, alleging errors of fact and law on the part of the GD. On May 31, 2016, the AD granted leave on the grounds that the GD may have erred in law as follows:

(a) Failed to apply *D'Errico v. Canada (Attorney General)*[1] by disregarding evidence of a failed work trial that showed the Applicant was incapable "regularly" of pursuing substantially gainful employment;

(b) Failed to apply *Inclima v. Canada (Attorney General)*[2] in taking the Applicant's final job as evidence of functionality rather than an abortive attempt to mitigate her impairments.

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[1] *D'Errico v. Canada (Attorney General),* 2014 FCA 95
[2] *Inclima v. Canada (Attorney General),* 2003 FCA 117

[7] In a notice dated July 27, 2016, the AD scheduled a hearing by videoconference for the following reasons:

(a) The complexity of the issues under appeal;

(b) The information in the file, including the need for additional information;

(c) The fact that an interpreter will be present;

(d) The fact that the appellant or other parties are represented;

(e) The availability of videoconference in the area where the Appellant resides;

(f) 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. In response to the AD's request, she made further submissions on June 30, 2016. The Respondent filed its submissions on July 15, 2016, to which the Appellant replied by way of a letter dated August 11, 2016.

**PRELIMINARY MATTER**

[9] Early in the hearing, the Appellant's representative indicated that she had requested a recording of the hearing before the GD but received no response from the SST. When I began my review, the recording was also unavailable, but it was subsequently found following further inquiry. It is unfortunate that the recording was not made available to the parties at the leave stage, as it might have helped them refine their submissions, but I have now reviewed it, and it has informed my decision.

**THE LAW**

[10] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal are:

(a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The General Division 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] According to subsection 59(1) of the DESDA, the AD may dismiss the appeal, give the decision that the GD should have given, refer the matter back to the GD for reconsideration in accordance with any directions that the AD considers appropriate or confirm, rescind or vary the decision of the AD in whole or in part.

[12] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an Appellant 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).

[13] 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.

[14] 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**

[15] The issues before me are as follows:

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

(b) Did the GD fail to apply *D'Errico* by disregarding evidence of a failed work trial?

(c) Did the GD fail to apply *Inclima* in taking the Appellant's final job as evidence of functionality rather than an abortive attempt to mitigate her impairments?

(d) If the answer to any of the three preceding questions is yes, what remedy is appropriate in this case?

**SUBMISSIONS**

**What is the appropriate standard of review?**

[16] 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.

[17] 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.

[18] The Respondent 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.

[19] 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.

[20] The Respondent's submissions discussed, in 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.

[21] 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*,[3] 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

[22] 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.

**Did the GD misapply *D'Errico*?**

[23] The Appellant submits that the GD misapplied *D'Errico* by failing to consider how her impairment prevented her from "regularly" pursuing employment, which the Federal Court of Appeal has interpreted to mean "consistent frequency." In particular, the Appellant alleges that the GD failed to consider evidence that her employment in 2008-09 constituted a work trial,

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

whose abandonment served to illustrate how she was unable to offer regularity prior to the MQP.

[24] The Respondent submits that the Appellant's case stands in distinction from *D'Errico*, which involved a claimant who made numerous attempts to work in various positions, including those more suited to her functional limitations, but had difficulty completing even limited hours of work per week. In the present case, there was no evidence of the Appellant making any effort to obtain alternative employment that did not involve the excessive use of her right arm and right shoulder after she left her position at the college in May 2009.

**Did the GD misapply *Inclima*?**

[25] The Appellant alleges that the GD gave adequate consideration to the possibility that her employment in 2008-09 was a failed work trial and in so doing failed to apply the mitigation principle from *Inclima*, which states:

> Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[26] The Appellant casts her taking a food service job in August 2008 as an admirable attempt to return to the workforce after an extended period spent convalescing from her 2004 MVA. She claims that she was soon forced to cease her employment due to pain and limitations, as well as anxiety, depression and fatigue.

[27] The Respondent acknowledges that while the GD's decision did not cite *Inclima*, this oversight was inconsequential, if unwise, and it did adequately consider the possibility that the Appellant's employment between 2008 and 2009 was a failed work trial. Specifically, the GD considered whether there was evidence that the Appellant had work capacity after the MVA.

[28] The GD highlighted the importance of objective medical evidence in its analysis. It reasonably inferred that the Appellant was not reliable based on inconsistencies in her

evidence with respect to significant matters. As a result of these inconsistencies, the GD was justified in placing greater weight on the documentary evidence.

[29] In assessing whether a claimant's health conditions meet the definition of disability under the CPP, the main question is whether the claimant has proven that he or she suffered from severe and prolonged disability on or prior to his or her MQP. If he or she has not done so, it is irrelevant that his or her condition deteriorated after the MQP.

[30] At paragraph [33], the GD assessed the Appellant's capacity to work after her 2004 MVA, anchoring its analysis in her 2007 medical report. She returned to the workforce in 2008 to a physically demanding position, and there was no evidence indicating that she was precluded from performing any substantial gainful employment at that time. The GD focused on the medical evidence closest to the MQP, and none of the medical reports from prior to December 2009 indicated a severe disability. Even the May 2010 report from the family doctor listed only one diagnosis—a rotator cuff tear affecting her right shoulder and right arm. The GD was therefore justified to conclude that, while the Appellant's medical conditions may have limited her ability to undertake physical labour involving repetitive use of her right arm and shoulder, they did not preclude her from undertaking all forms of employment. As trier of fact, the GD was in the best position to weigh the evidence and draw appropriate conclusions based on the evidence.

[31] The Respondent submits, in the alternative, that the GD committed no error because *Inclima* did not apply. That case may be invoked when two conditions are met: (i) there is evidence of work capacity and (ii) the claimant has shown efforts in obtaining and maintaining substantially gainful employment. Only if those two conditions were met could the GD assess whether the Appellant's efforts to work were unsuccessful by reason of her health condition. In this case, there was evidence of work capacity in and around the Appellant's MQP, as demonstrated by the fact that she was working in 2009. Furthermore, the Respondent submits that, in this case, there was no evidence of the Appellant making any effort to obtain or maintain work that was more suited to her functional limitations. As the two conditions were not met, *Inclima* was not operative in this case. In other words, while the Respondent acknowledged that the Appellant may not have been able to do her usual job, as

there was evidence of capacity, she was required to show that she made efforts to obtain and maintain work that was more suited to her functional limitations.

## ANALYSIS

### Standard of Review

[32] 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.*[4] 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.

[33] 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.

[34] 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."

### *D'Errico* and *Inclima*

[35] I will deal with the two substantive issues together as they both revolve around how the GD approached the Appellant's nine months as a cafeteria worker in 2008-09. The evidence indicates that the Appellant did not work for four years after her MVA in 2004 but

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

returned to employment at Conestoga College in August 2008, working there for the next nine months.

[36] In my view, the GD was obliged to address the Appellant's nine-month period of employment, coming as it did so close to the end of the MQP. In doing so, it had two options open to it: Regard it as evidence of the Appellant's capacity, given the fact that she was working years after her injuries—or, alternatively, take it as evidence of her lack of capacity, given the fact that she earned only modest wages and left after only a brief period. One way or the other, the GD had a duty to explain its characterization of those nine months

[37] However, the GD's analysis contains only scant discussion of the Appellant's job at Conestoga College. There is no indication that it even considered the possibility that her nine months working in the cafeteria might have amounted to a "failed work trial"; indeed, it seems to have taken for granted that her employment was *prima facie* evidence that she was capable regularly of pursuing a substantially gainful occupation.

[38] In paragraph [28], the GD wrote:

> She indicated on her Questionnaire (May 2010) that she could no longer work in March 2008, but continued to work until May 2009.

In paragraph [29], it wrote:

> Although she indicated [in her March 2013 Questionnaire] she could no longer work in April 2004 she returned to work until 2009.

[39] The above extracts are the sum total of all references to the nine-month cafeteria job in the GD's analysis. I am not suggesting that the GD went beyond its authority or necessarily made an erroneous determination that the cafeteria job was evidence of capacity; it certainly had the right to make that finding as trier of fact. However, fairness demands that the GD should have offered some kind of explanation as to why it made a finding on what would appear to be an important factual issue.

[40] In its decision at paragraph [12], the GD found, without further explanation, that the Appellant "quit" her most recent job, but the record tells a more complicated story. While the

Appellant stated that she was "let go/laid off" in her May 2010 Questionnaire, she cited "disability" in her March 2013 Questionnaire. Of course, these reasons are not mutually exclusive, and it is possible to be terminated from a job if one no longer has the physical capacity to carry out its essential tasks. As it happens, the Appellant testified (at 14:44 of the hearing recording) that she left the cafeteria job in May 2009 on the advice of her family doctor after she complained to him that she felt increasing pain despite taking light duties. The recording of the hearing indicates that there was a brief discussion of the cafeteria job that focused on the Appellant's reasons for leaving it. In none of her submissions before the GD—either written or oral—did the Appellant's representative explicitly make the argument that her client's last job was best characterized as a failed work trial.

[41] The GD's neglect of the failed work trial theory would be immaterial had it not relied on the Appellant's cafeteria job to conclude her disability fell short of severe. However, the GD's analysis leaves little doubt that GD based its decision, in large part, on its assumption that her nine-months at Conestoga College demonstrated work capacity, rather than its opposite. In paragraph [33], the GD wrote:

> The Appellant then returned to work indicating the medical conditions were not severe as they did not render her incapable regularly of pursuing any substantially gainful occupation.

[42] Moreover, this adverse inference formed a second link in the GD's chain of logic. The GD found that the Appellant's testimony was "unreliable" because of contradictions between her testimony and the documentary evidence. In paragraphs [28] and [29], the GD cited three purported inconsistencies, one of which was the discrepancy between her having previously claimed she could no longer work as of March 2008, even though she "continued to work until May 2009." However, I'm not sure that it is fair to label this an inconsistency that necessarily devalues the Appellant's testimony. If the essence of the Appellant's submissions was that she was no longer capable of work after her MVA, then she is owed a fair consideration of evidence that her employment afterwards was a failed work trial. To judge her reliability as a witness on her "false" claim that she was incapable of work in 2008-09 strikes me as a form of circular reasoning in which premise and conclusion become indistinguishable.

[43] Having discounted the Appellant's testimony and disregarded evidence that the nine-month job may have been a failed work trial—unfairly in my view—the GD then proceeded to place significant weight on the medical evidence in and around the MQP. In paragraph [31], it specifically found that, while an impairment to her right arm might preclude "heavy labour," it did not constitute a condition that rendered her incapable regularly of pursuing any substantially gainful occupation. The GD mentioned the word "regularly" three times in its analysis, but only in the context of citing the statutory definition of "severe" set out in paragraph 42(2)(a) of the CPP. I saw no attempt to assess whether this individual, suffering from a documented pre-MQP rotator cuff tear and possessed of limited education and English language skills, was capable of "regular" work. Instead, the GD minimized this evidence by pointing to her nine-month stint as a cafeteria worker, once again employing circular reasoning.

[44] In doing so, the GD erred in law by failing to apply both *D'Errico* and *Inclima*. The Respondent attempted to distinguish *D'Errico* by arguing that the latter case involved an individual who repeatedly returned to work in positions more suited to her functional limitations, in contrast to the Appellant, who made a single attempt to return to work in a job that may have been as physically demanding as her previous occupations. While I agree that the comparison between the two factual situations may not favour the Appellant, that is not the point. If nothing else, *D'Errico* stands for the proposition that a trier of first instance in CPP disability cases must make at least a serious attempt to grapple with the concept of regularity. As the Appellant claimed that she could not manage her duties at Conestoga College, it was incumbent on the GD to meaningfully assess the evidence to that effect, but I saw nothing in the decision of the GD to indicate that it did so.

[45] Similarly, whether or not Appellant portrayed her nine-month Conestoga job as a valiant but unsuccessful attempt to return to work despite her debilities, the GD had a positive duty to assess her evidence to that effect through the lens of *Inclima*. In its decision, the GD did not mention *Inclima* and was silent on whether it believed the Appellant discharged her duty to mitigate her impairments by attempting to remain in the workforce and, in fact, took her nine- month job as evidence of functionality. I would not go as far to say that every disability decision must mention *Inclima*, but its principles must nevertheless be followed.

Where there is evidence of work capacity, a person must show that effort at obtaining and maintaining employment has been unsuccessful by reason of the person's health condition. In practical terms, this means that once there is a finding of residual capacity (as there was in this case), the question then becomes whether the Appellant did everything reasonably possible to remain in the labour market. There is nothing in the decision to indicate that the GD turned its mind to this issue.

[46] The Respondent submits that while the GD may not have cited *Inclima*, it nonetheless applied it, when it ruled out the possibility that the Appellant's most recent employment was a failed work trial based on its finding that she had work capacity after her 2004 MVA. With respect, I cannot agree. As discussed, there is no indication in its decision that the GD gave any consideration to the possibility that the nine months at Conestoga College was anything but evidence of the Appellant's ongoing capacity. The Respondent also notes that there was no evidence the Appellant attempted lower impact work more suited to her restrictions. This may be true, and it was open to the GD to make this finding, but the point here is that it did not, because, as already noted, it never directed its mind to the possibility that the nine-month job was evidence of capacity, rather than an effort to return to work *despite* incapacity.

[47] The Respondent submitted in the alternative that *Inclima* did not apply because the Appellant had not satisfied the precondition of having attempted to obtain and maintain employment. There was no evidence, so the Respondent argued that the Appellant made an effort to secure alternative employment that was suited to her functional limitations.

[48] I find this argument unconvincing because it presupposes that the Appellant's Conestoga job did not constitute the requisite effort to attempt to "obtain and maintain [alternative] employment." One can only find lack of effort to obtain employment on the Appellant's part if her nine months at the cafeteria are regarded purely as evidence as capacity, and as discussed above, it is unfair to make such a finding without explaining the rationale for doing so. I might also add that it is not immediately obvious that the Appellant's last job was no less physically demanding than her previous hospital job. Indeed, the nature and extent of her role at the college cafeteria might have been an

illuminating avenue of inquiry, but the GD did not pursue it, even though the Appellant testified in passing that she was placed on light duties during her brief time at Conestoga.

[49] In short, I do not find that the GD was relieved of its obligation to consider the principles exemplified by *Inclima* and *D'Errico* against the evidence introduced by the Appellant, even though those principles were not specifically invoked by the Appellant.

**CONCLUSION**

[50] For the reasons discussed above, the appeal succeeds on the ground at the GD erred in law by failing to apply the *Inclima* and *D'Errico* cases when it assumed the Appellant's last job was proof of functional capacity, thereby ignoring evidence that it was an abortive attempt to mitigate her impairments.

[51] 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