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

Citation: *D. B. v. Minister of Employment and Social Development*, 2016 SSTADIS 501

Tribunal File Number: AD-16-475

BETWEEN:

D. B.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: December 22, 2016

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] This is an appeal of the decision of the General Division (GD) of the Social Security Tribunal (SST) issued on December 22, 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, 2011. Leave to appeal was granted on October 12, 2016, on the grounds that the GD may have erred in rendering its decision.

OVERVIEW

[3] The Appellant was 51 years old when she applied for CPP disability benefits on February 18, 2013. In her application, she disclosed that she attended school up to Grade 10 and worked in a variety of positions, among them security guard, cleaner and retail associate. She was most recently employed as department manager at Walmart, a job that ended after she injured her back. She made two short-term attempts to return to work but was unable to perform modified duties because of back pain.

[4] 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 April 2, 2014, the Appellant appealed these denials to the GD.

[5] At the hearing before the GD on December 10, 2015, the Appellant testified about her education and work experience. She said that she was healthy until she injured her back while lifting a heavy box at work. She had attempted numerous treatments with only limited effect, although she had found that marijuana did help to ease her pain. She had been working at a bingo hall for the previous 10 months but had recently tendered her resignation.

[6] In its decision of December 10, 2015, the GD dismissed the Appellant's appeal, finding that, on a balance of probabilities, she was capable of substantially gainful work. The GD found that her employment at a bingo hall on a First Nation reserve suggested she had the ability to sustain employment, given her work experience and transferrable skills. The GD was also skeptical that her reason for quitting the job—her asthma was aggravated by the prevalence of smoke in her working environment—proved that she was incapable of all forms of employment.

[7] On March 23, 2016, the Appellant's representative filed an application for leave to appeal and notice of appeal with the Appeal Division (AD) of the SST, alleging errors of fact and law on the part of the GD. On October 12, 2016, the AD granted leave on the grounds that the GD may have:

(a) Based its decision on an erroneous finding of fact in disregarding the Appellant's testimony that she twice attempted to work at the bingo hall for short periods of four and five months; respectively;

(b) Based its decision on an erroneous finding of fact in disregarding oral evidence that the Appellant ceased her employment at the bingo hall for reasons other than her asthma being aggravated by second-hand smoke;

(c) Based its decision on an erroneous finding of fact in ignoring the Appellant's testimony that she consumed marijuana through the use of a vaporizer in order to not irritate her lungs;

(d) Erred in law by inappropriately citing *Miller v. Canada*[1] to benchmark the Appellant's post-MQP earnings at the bingo hall.

[8] The AD also invited the parties to provide submissions on whether a further hearing was required and, if so, in what format. On November 21, 2016, an individual from the office of the Appellant's authorized representative made a written request for an extension of time for submissions, because his client intended to attend a functional capacity examination (FCE) and

[1] *Miller v. Canada*, 2007 FCA 237.

any report arising from it would not be available until past the 45-day deadline. In a letter dated November 23, 2016, I denied this request on the ground that an appeal to the AD is not an opportunity to submit new evidence or reargue one's case on its merits. Moreover, I doubted that the resulting FCE report would be relevant to any of the grounds of appeal for which leave was permitted.

[9] The Respondent filed its submissions on November 28, 2016.

[10] I have decided that an oral hearing is unnecessary and the appeal can proceed on the basis of the documentary record for the following reasons:

(a) There are no gaps in the file or need for clarification;

(b) The form of hearing respected the requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

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

(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.

[12] 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.

[13] 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).

[14] 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.

[15] 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

[16] 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 by:

- Disregarding the Appellant's testimony that she twice attempted to work at the bingo hall for short periods of four and five months, respectively?
- Disregarding oral evidence that the Appellant ceased her employment at the bingo hall for reasons other than aggravation of her asthma by second-hand smoke?
- Ignoring the Appellant's testimony that she consumed marijuana through use of a vaporizer in order to not irritate her lungs?

(c) Did the GD err in law by using an inappropriate benchmark to assess the Appellant's post-MQP earnings at the bingo hall?

SUBMISSIONS

Standard of Review

[17] The Appellant made no submissions on this matter.

[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] The Respondent's submissions discussed, in 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.

[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*,[2] 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.

[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.

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

Nature of Employment at Bingo Hall

[22] In paragraph 22 of its decision, the GD found that the Appellant's job at the bingo hall demonstrated her ability to maintain employment. The Appellant alleges that this finding did not accurately reflect her testimony, in which she said that she worked at the bingo hall for four months before resigning, because she could not handle the physical aspects of the job. Her employer subsequently provided her with further accommodations, but she could only sustain employment for an additional five months.

[23] The Respondent argues that the GD committed no error: The audio recording of the hearing indicates that the Appellant did not testify that she had twice stopped working at the bingo hall. Furthermore, she did not mention that she stopped working at the bingo hall because she found the accommodations inadequate.

Reasons for Ceasing Employment at Bingo Hall

[24] The Appellant objects to paragraphs 13 and 22 of the decision, in which the GD wrote that she intended to cease her employment because her asthma was aggravated by second-hand smoke, disregarding her testimony that it was merely a contributing factor to her inability to perform her essential job duties. In fact, she wanted to leave her job because she was in pain.

[25] The Respondent insists that the GD did not disregard or distort the Appellant's testimony. First, there is no evidence that the Appellant left her job at the bingo hall at the time of the hearing. At the 27:00 mark of the audio recording, the Appellant disclosed that she was working at the time of the hearing, although she indicated that she intended to leave the position. Second, the Appellant stated at multiple points throughout the hearing that her biggest challenge at the bingo hall was its smoke filled working environment and its effect on her asthma. At 31:27, the Appellant remarked that she could not walk at the end of her shifts and had taken two weeks off. However, she later noted that she had recently started a less demanding position that had allowed her to complete longer periods of work.

[26] At 57:28, the Appellant stated that working at the bingo hall was "going to kill" her, at which point, her representative noted that her biggest challenge in the bingo hall was her asthma. At 1:00:22, the Appellant mentioned her irritable bowel syndrome (IBS) and the

arthritis in her hands as additional physical barriers to her employment, although neither of these medical conditions was listed at the time of her MQP. The only objective medical evidence relating to arthritis and IBS was dated 2013, after her MQP.

Use of Vaporizer

[27] The Appellant alleges that the GD ignored evidence that she delivers marijuana to her system through the use of a vaporizer, which does not irritate the lungs as smoking would. In finding it "counterintuitive" that cigarette smoke drove the Appellant from her job (and presuming that she was able to tolerate marijuana smoke), the GD based its decision on a factual error. Furthermore, the GD suggested she was not being personally responsible in managing her pain, although she testified smoking marijuana does not exacerbate her asthma.

[28] The Respondent maintains that the GD committed no error because the Appellant did not disclose her use of a vaporizer at the hearing. She referred to marijuana only once in her testimony, saying at the 22:33 mark that she had been smoking non-prescription marijuana daily and it was helping with her pain and mental health. Shortly afterward, the GD asked her how using marijuana affected her asthma. The Appellant merely stated that it had not impacted her asthma. She made no mention of a vaporizer.

Use of *Miller* to Determine Bingo Hall Earnings Were Substantially Gainful

[29] In paragraph 23, the GD cited *Miller v. Canada*, but the Appellant believes that it depended on a significantly different set of facts from her situation. Whereas the claimant in *Miller* earned significant wages over a continuous two-year period, the Appellant worked for two periods of four and five months, respectively, for less than half the income.

[30] In my decision granting leave, I suggested the Appellant may not have been given adequate opportunity to respond to submissions on case law. The Respondent replies that the GD canvassed the *Miller* case during the hearing, and he audio recording demonstrates that neither the Appellant nor her representative requested any additional time to consider the decision or to make written submissions after the fact. At the 1:13:08 mark, the GD directly asked the Appellant's representative for her submissions on the application of *Miller* to her client's case. The representative proceeded to argue that *Miller* did not apply to the Appellant's

employment at the bingo hall, as it was an extended work trial as opposed to evidence of work capacity.

[31] Citing *Benitez v. Canada (Minister of Citizenship and Immigration)*,[3] the Respondent argues that it is trite law that any allegations of a procedural fairness violation must be raised at the earliest practical opportunity. The earliest practical opportunity is where "the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection." A party "cannot wait until it has lost before crying foul." The Appellant and her representative did not raise any concerns around the GD's reference to *Miller* and was given an opportunity to make submissions. Thus, the Appellant cannot now claim that she was not afforded procedural fairness after the fact.

[32] As for the substance of the comparison between *Miller* and the present case, the Respondent argues that the GD did not cite the precedent to benchmark the Appellant's post-MQP earnings at the bingo hall. Rather, it relied on the principle in *Miller* which states that "the capacity of an applicant for a disability benefit to regularly engage in remunerative employment is the very antithesis of a severe and prolonged disability." The GD reasonably concluded that the fact that the Appellant was working at the time of the hearing, almost six years after her MQP, was evidence of work capacity.

[33] The Respondent acknowledges that while the GD did compare the earnings in *Miller* to those of the Appellant, the GD's focus was not on the Appellant's earnings but rather inconvertible evidence suggesting she still had the capacity to work 77-78 hours over a two-week period. The GD drew a comparison between the Appellant and *Miller* because in both cases the claimants returned to remunerative work after their respective MQPs, demonstrating work capacity.

[34] While it is true that the claimant in *Miller* had returned to work for two years and had more earnings than the Appellant, this was not the essential point of comparison. Rather, the central issue was that the Appellant's return to work demonstrated capacity. This is evident at paragraph 23 of the GD's decision, where it concludes that "the facts of the *Miller* decision are not distinguishable from this Appeal. The Tribunal finds that the Appellant showed a capacity

[3] *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 FCR 107.

to regularly engage in remunerative employment and this is the very antithesis of a severe and prolonged disability."

[35] Furthermore, there is evidence that the GD did consider whether the Appellant's return to work could be characterized as a failed attempt to mitigate, as indicated by its remarks at the 1:14:47 mark of the audio recording. However, as the GD noted at paragraph 22 of the decision, the *Inclima*[4] case requires that where there is evidence of work capacity, a claimant must show that efforts at obtaining and maintaining employment have been unsuccessful by reason of the person's health condition. At 38:48, the Appellant testified that she was only now quitting her job because her son had joined the army and she no longer had to financially support him. At 53:21, she said that she had been retrained for a new role at work, which she found to be easier. Given this evidence, the GD reasonably concluded that her efforts at maintaining employment had not been unsuccessful by reason of her health condition.

ANALYSIS

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.*[5] 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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[4] *Inclima v. Canada (A.G.)*, 2003 FCA 117.
[5] *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."

Alleged Misrepresentations Concerning Employment at Bingo Hall

[39] As two of the Appellant's allegations of factual misrepresentation involve different aspects of her post-MQP job, I will address them together.

[40] As the hearing file contains nothing about the Appellant's recent job at the bingo hall, it appears that all the evidence about it must have been given in testimony. I have now had an opportunity to listen to the audio recording of the hearing to determine whether the GD accurately relayed the substance of the Appellant's testimony on this matter. It is important to keep in mind, however, that a factual error on the part of the GD in and of itself is not grounds to overturn a decision; rather, that error must also have: (i) been made in a perverse or capricious manner or without regard for the material before it and (ii) formed the basis for the decision— that is, it must have been material.

[41] In its decision, the GD summarized the Appellant's testimony on the subject of her bingo hall job as follows:

> [12] The Appellant testified that she has been working at a Bingo Hall located on a Reservation. She indicated she has been working at the Bingo facility for about 10 months. She has worked about 20-40 hours per week. Her recent position involves standing at a ticket window, selling bingo cards. This position has increased her hours and a recent pay stub indicated she worked 77-78 hours based on a two week pay period.
>
> [13] The Appellant testified she gave her notice to the employer due to her asthma. Since the facility is not governed by anti-smoking laws the workplace has a heavy presence of smokers and the air is thick with second hand smoke. This aggravates her asthma so she is resigning. She testified that this job has been difficult and she finds herself crying on the way to and from work.

[42] There is little question that the Applicant's post-MQP work played a significant role in its decision to deny the Appellant CPP disability benefits. Its finding that she was carrying on substantially gainful employment nearly five years after her MQP ended led it to conclude that her claimed disability was neither severe nor (one presumes) prolonged.

> [22] …The reason for her resignation is her asthma which is aggravated by the heavy smoking at the bingo hall. This would not constitute a barrier in a comparable workplace. The Appellant has been unsuccessful at the bingo hall because of her health condition of asthma. This work environment is very unusual and she should not incur the same conditions in other workplaces. The Appellant showed an ability to be capable regularly of pursuing any substantially gainful occupation and showed the physical ability to work. The Appellant was able to fulfill her employment duties except for the barrier of cigarette smokers. This health condition would not render her unsuccessful in a smoke free environment.

[43] This passage indicates that the GD found that inability to tolerate smoke was the sole reason for the Appellant's impending resignation from the bingo hall. It is also clear that the GD did not see the bingo hall—one of the few remaining public venues exempt from anti-smoking laws—as representative of most workplaces and therefore no indictor of whether the Appellant was capable of alternative work. The essence of the Appellant's allegations are that the GD minimized her struggles with the physical aspects of her job at the bingo hall job (ignoring testimony that she left it twice) and falsely found that she had quit solely because of her asthmatic condition, rather than back pain. The Respondent is correct to note that the Appellant disclosed that she was still working at the time of hearing, but then she never denied this, and only said that, having given notice, her last day would be at the end of the month. However, contrary to the impression left by the GD's decision, she did testify that pain, as much as asthma, was a factor in her intention to leave the bingo hall, as indicated by the following extracts transcribed from the audio recording:

> 30:30:
>
> Member: So do you think you'll keep working there?
>
> Appellant: No. I've already given notice. I'm leaving at the end of the year.
>
> Member: Why?
>
> Appellant: I can't do it. It's a smoke-filled environment… I can't breathe. My asthma… plus I have polyps in my sinus and they come back from the smoke.

> 31:10:
>
> Appellant: It's not only the smoke but at the end of the day whether I work 2½ hours or whether I work seven hours, I literally cannot walk… I left the job for two weeks, thinking I wasn't going to go back because I didn't want to and I couldn't do it. In the two weeks that I left, I was almost financially ruined.
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> 32:35:
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> Appellant: I mentally, physically cannot do the job. I have literally, at the end of my shifts, slept in my vehicle because I could not get out.
>
> 33:50:
>
> Member: If there wasn't smoking (much to my surprise) at that bingo hall, would you be able to keep working there if it was smoke-free?
>
> Appellant: No, because my back can't handle it. My hands. I have arthritis really bad and the job that I do consistently requires use of my hands and if I keep doing this, I'm going to have no use of my hands.

[44] Considered in total, the Appellant's testimony indicates that she did not blame her difficulties at the bingo hall solely on her asthma-related intolerance to cigarette smoke, as suggested by the GD in its decision. While she said that IBS and arthritis in her hands impeded her ability to work, she also referred on more than one occasion to the back pain that is the foundation of her disability claim and for which there does exist pre-MQP medical evidence. The GD's omission also colours its subsequent finding that the Appellant made insufficient effort to investigate alternative work, as back pain would preclude many more occupations than would intolerance to smoke—particularly in today's world of widespread tobacco bans.

[45] In my view, the GD based its decision to deny the Appellant benefits on a finding that was unsupported by the evidentiary record—that workplace smoking was the only reason she decided to leave the bingo hall.

Vaporizer

[46] I granted leave to appeal on the ground that GD may have erred by ignoring the Appellant's evidence that she consumed marijuana through a vaporizer, thereby reducing smoke that might irritate her lungs. This subject took on significance because the GD in its decision expressed a note of skepticism that someone claiming to suffer from disabling asthma would find it therapeutic to smoke marijuana on a daily basis.

[47] Having reviewed the audio recording of the hearing, I must agree with the Respondent that the Appellant never mentioned using a vaporizer in her testimony. At the 22:30 mark and again at 49:55, she told the GD that she "smokes" non-prescription marijuana daily. At 24:15, the GD specifically asked the Appellant what effect the marijuana had on her asthma. She replied, "Fine. [No problem] that I'm aware of."

[48] Leaving aside the question of whether use of a vaporizer would in fact be recommended for someone suffering from asthma, the Appellant was given a prime opportunity to address the GD member's pointed questions by raising her use of an alternative means of administering marijuana. As she did not do so, the GD reasonably concluded that the Appellant was consuming marijuana by means of smoking it. Whether or not the Appellant was in fact making use of a vaporizer, she cannot, now that the GD hearing is closed, introduce new evidence before the AD in a bid to overturn a prior finding of fact.

Application of *Miller v. Canada Opportunity to Respond*

[49] Leave to appeal was granted on the ground that the Appellant may not have been given an adequate opportunity to respond to *Miller*. This case was first raised, not by the Respondent, but by the GD member during the hearing in response to the Appellant's testimony that she had been working at a bingo hall for the previous 10 months and had earned what she estimated was between $15,000 and $17,000 during that period. I thought it was possible that norms of procedural fairness might have been violated in the event the Appellant was denied her right to reply to the case against her, particularly since the GD went on to root much of its reasons in *Miller*. However, having listened to the audio recording of the hearing, I must conclude that no injustice was done.

[50] At the 36:10 mark, the GD asked the Appellant's representative if she was familiar with *Miller* and, having been advised that she was not, briefly summarized the ratio of the binding precedent. The GD member explained why, in light of *Miller*, he felt that the Appellant's work at the bingo hall was potentially problematic to her case. At the 1:13:08 mark, the GD directly asked the Appellant's representative for submissions on the application of *Miller* to her client's case. The representative proceeded to argue that *Miller* did not apply to the Appellant's employment at the bingo hall. Instead, she characterized her employment as an extended work

trial as opposed to evidence of work capacity. As noted by the Respondent, neither the Appellant nor her representative requested any additional time to consider the decision or to make post- hearing submissions.

[51] While it is likely that the Appellant's representative was surprised by the GD's demand that she make submissions on *Miller*, it was open to her to request additional time in which to prepare a response. I agree with the Respondent that allegations of a violation in procedural fairness must be raised at the earliest practical opportunity, and a party "cannot wait until it has lost before crying foul," although I must confess that the case cited for these propositions (*Benitez*) does not seem to me to be on point. In any case, a party, particularly one with legal representation, is presumed to know the law and, as it happens, the Appellant's representative did manage to address the principle raised by *Miller*.

Use of* Miller *as an Earnings Benchmark

[52] The Respondent was at pains to draw a distinction between citing *Miller* for the principle it raised ("the capacity of an applicant for a disability benefit to regularly engage in remunerative employment is the very antithesis of a severe and prolonged disability") versus its utility as a quantitative benchmark for "substantially gainful" earnings. The Respondent acknowledged that the GD compared the earnings in *Miller* to those of the Appellant, but insists that its focus was not on her earnings but rather inconvertible evidence suggesting she still had the capacity to work up to 78 hours over a two-week period.

[53] The Appellant does not take issue with the GD's interpretation of the underlying principle of *Miller* but submits that it revolved around a significantly different set of facts from her situation and was thus not a fair point of comparison. Whereas the claimant in *Miller* earned significant wages over a continuous two-year period, the Appellant argues that she worked for two periods of four and five months, respectively, for less than half the income.

[54] Contrary to the submissions of the Respondent, I find that the GD did more than simply adopt the principle behind *Miller*, but also used the specific facts in that case to benchmark the Appellant's earnings:

> The Miller decision is binding on the Tribunal. In the Miller case the applicant had returned to work after the MQP earning $10,000.00 and $38,000.00 in a two year period. In this Appeal the Appellant returned to work earning about $17,000.00 and has worked 77-78 hours over a two week period.

[55] That said, I do not see how, in making such a numerical comparison, the GD erred in law or breached any principle of natural justice. In referring to *Miller*, the GD was ultimately doing no more than assessing the Appellant's bingo hall wages for the purpose of determining whether they amounted to disqualifying post-MQP earnings. In my view, this fell squarely within the GD's jurisdiction, as trier of fact, to weigh the evidence as it saw fit. In a hearing in which post- MQP earnings were an obvious issue, it was foreseeable that case law on this subject would be raised. It was open to the Appellant and her representative to counter the *Miller* example with precedential earnings benchmarks of their own, but they did not do so. Against this void, the GD had the jurisdiction to determine that the Appellant's hours and income suggested a capacity to regularly pursue substantially gainful employment.

Consideration of Bingo Hall Job as Failed Work Trial

[56] Although the Appellant did not specifically plead this ground, implicit in her submissions is the suggestion that the GD either failed to consider or misapplied *Inclima* in taking her 10 months at the bingo hall as evidence of capacity, rather than as a failed work trial. The Respondent nevertheless addressed this ground, noting several instances that it said showed the GD did consider whether the Appellant's return to work was better characterized as a failed attempt to mitigate.

[57] Having reviewed the decision in the context of the relevant portions of the hearing recording, I agree with the Respondent that the GD discharged its obligation to give due consideration to the Appellant's submission that her final job constituted a failed work trial. In her closing remarks, the Appellant's representative explicitly characterized her client's time at the bingo hall in this way, and the GD member listed this point in its summary of the

Appellant's submissions at paragraph 19(a): "The Appellant's 10 month employment at the Bingo Hall should be viewed as an unsuccessful attempt to return to work. It is a work trial that was not successful and does not indicate the Appellant is capable regularly of pursuing any substantially gainful occupation." In the end, the GD concluded that the Appellant quit for reasons other than her health condition and, while one can question, as I have above, whether that conclusion was based on a faulty premise, paragraphs 22 and 23 suggest that the GD gave real consideration to the question of whether the bingo hall job indicated capacity or lack of capacity.

CONCLUSION

[58] For the reasons discussed above, the appeal succeeds on the ground at the GD based its decision on an erroneous finding that the Appellant ceased her employment at the bingo hall for reasons other than aggravation of her asthma by second-hand smoke.

[59] 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