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

Citation: *Minister of Employment and Social Development v J. R.*, 2019 SST 584

Tribunal File Number: AD-19-92

BETWEEN:

Minister of Employment and Social Development

Appellant

and

J. R.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: June 11, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Respondent, J. R., is a high school graduate who was self-employed as a X until June 2015, when, he claims, declining mental health made it impossible for him to continue working. He is now 50 years old.

[3] In July 2017, the Respondent applied for a Canada Pension Plan (CPP) disability pension, claiming that he could no longer work because of depression and asthma. The Appellant, the Minister of Employment and Social Development (Minister), refused the application because it found that the Respondent's disability was not "severe and prolonged," as defined by the *Canada Pension Plan*. The Minister noted that the Respondent had never required regular ongoing mental health treatment and that his asthma was controlled by medication.

[4] The Respondent then appealed the Minister's refusal to the General Division of the Social Security Tribunal. On October 31, 2018, the General Division held a hearing by videoconference and later issued a decision allowing the appeal. In its reasons, the General Division accepted the Respondent's testimony that depression left him unmotivated and lacking energy. Moreover, it did not hold the Respondent's refusal to take antidepressant medication against him, finding that his noncompliance with treatment recommendations was "not unreasonable" because lack of motivation was a symptom of his illness.

[5] On January 31, 2019, the Minister requested leave to appeal from the Tribunal's Appeal Division, alleging that the General Division committed various errors in rendering its decision, specifically:

- The General Division erred in law by failing to apply the correct test for disability, which requires claimants to comply with reasonable treatment recommendations. The General Division did not assess whether it was reasonable

for the Respondent to refuse Cipralex and other antidepressants because he preferred to take vitamin D instead.

- The General Division based its decision on an erroneous finding that the Respondent's refusal to take prescription medication was a "symptom of his illness." In fact, there was no evidence to that effect on the record.
- The General Division based its decision on an erroneous finding that the Respondent's family physician reported that his prognosis was "poor." In fact, Dr. Michael Lee wrote, in his CPP medical report, that the Respondent's prognosis was poor because he was not interested in taking medication[1]—important contextual information that the General Division omitted.

[6] In my decision dated March 5, 2019, I allowed leave to appeal because I saw a reasonable chance of success for the Minister's submissions.

[7] In written submissions dated May 10, 2019, Mr. Kirby, the Respondent's legal representative, defended the General Division's decision, noting that General Division had considered his client's reasons for refusing medication and found them credible and reasonable. Mr. Kirby reminded the Appeal Division that the General Division was entitled to deference on findings of fact.

[8] I have decided that an oral hearing is unnecessary for this appeal. I am proceeding solely on the basis of the existing documentary record, in part because the Respondent has expressed a preference for this option. Although there are gaps in the record—the recording of the General Division hearing is only intermittently audible—I am satisfied that I can decide this matter based on the material before me.

[9] Having reviewed the record and considered the parties' written submissions, I have concluded that the General Division erred in arriving at its decision. I have also concluded that the appropriate remedy in this matter is to return it to the General Division for a new hearing.

[1] GD2-76.

PRELIMINARY MATTER

[10] After the Appeal Division allowed leave to appeal, Mr. Kirby requested a copy of the audio recording of the General Division hearing. The Tribunal duly forwarded a compact disc containing an MP3 file that turned out to be, in Mr. Kirby's words, "unintelligible." In an accompanying letter, the Tribunal attributed the sound quality to technical difficulties. On April 1, 2019, Mr. Kirby alleged that, in the absence of a "complete" record, his client's appeal had been severely compromised.

[11] I reviewed the recording and confirmed that large portions—although not all—of the Respondent's testimony were muffled, possibly because of poor microphone placement. On April 23, 2019, I convened a pre-hearing teleconference to discuss the implications of an unusable recording.

[12] I heard submissions from both sides and, in the end, disagreed with the Respondent that the absence of a recording necessarily compromised his ability to participate in the appeal process. I noted that the issues in this appeal revolve around how the General Division assessed the Respondent's explanation for not taking prescription medication. I agreed that, while it would have been useful to have a complete recording of the hearing, it was not essential to decide the issues in this matter. I also noted that some of the Respondent's testimony could be heard on the recording, albeit with difficulty. Where gaps existed, I was prepared to hear sworn testimony, if it promised to be relevant to the issues. I observed that, in any event, testimony was only one part of the record, which also included doctors' reports, the Respondent's correspondence, and the General Division's decision itself.

[13] Nothing the legislation governing the Tribunal requires it to record hearings, although it does so as a matter of good practice. Mr. Kirby demanded copies of any notes that the presiding General Division member may have taken during the hearing, but I saw no statutory authority to enable me to make such an order, nor did I see any case law from the Federal Court or Federal Court of Appeal that addressed this question. Decisions at other court levels suggested that the notes taken at hearings by administrative tribunal members remain their personal property,

unless explicitly directed otherwise by statute.[2] In any event, even if I had determined that I had the authority to order production of notes from the General Division, I would not have been inclined to do so. Hearing notes are a personal and unreliable record of the evidence, subject to wide variables such as the diligence of the member and his or her ability to write rapidly and legibly. I did not think that requesting the General Division's notes would have served any useful purpose in this instance.

ISSUES

[14] According to section 58 of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: the General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) 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.

[15] I must address the following issues:

Issue 1: Did the General Division err in law by failing to consider the reasonableness of the Respondent's explanation for not taking prescription antidepressants?

Issue 2: Did the General Division find, without evidence, that the Respondent's refusal to take prescription medication was a "symptom of his illness"?

Issue 3: Did the General Division mischaracterize Dr. Lee's prognosis?

ANALYSIS

[16] In *Canada v Huruglica*,[3] the Federal Court of Appeal held that administrative tribunals must look first to their home statutes for guidance when determining their role: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent."

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[2] *Yorke v Northside-Victoria District School Board*, 1992 CanLII 8537 (NSSC); *Re: Rent Review Hearings Board*, 1993 CanLII 4724 (ON IPC); *Re: Ontario (Social Assistance Review Board)*, 1994 CanLII 6570 (ON IPC).
[3] *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93.

[17] Applying this approach to the DESDA shows that sections 58(1)(a) and (b) do not define what constitutes errors of law or breaches of natural justice, which suggests that the Appeal Division should hold the General Division to a strict standard on matters of legal interpretation. In contrast, the wording of section 58(1)(c) suggests that the General Division is to be afforded a measure of deference on its factual findings. The decision must be **based** on the allegedly erroneous finding, which itself must be made in a "perverse or capricious manner" or "without regard for the material before [the General Division]." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division commits a material factual error that is not merely unreasonable, but clearly egregious or at odds with the record.

Issue 1: Did the General Division err in law by failing to consider the reasonableness of the Respondent's explanation for not taking prescription antidepressants?

[18] According to the leading case of *Lalonde v Canada*,[4] disability claimants must mitigate their impairments by following their treatment providers' recommendations. *Lalonde* also requires decision-makers to consider whether a claimant's refusal of recommended treatment is unreasonable and, if so, what impact that refusal is likely to have on the claimant's disability status. Even if it has been established that a claimant did not submit to recommended treatment, the decision-maker must still look into whether there was some good reason for that omission and give fair consideration to the effect of the omission on the claimant's capacity.

[19] On this particular question, I cannot find an error of law. The General Division correctly cited the *Lalonde* case and fulfilled its obligation to consider whether the Respondent had a reasonable explanation for refusing to take prescribed medications:

> I must consider whether the Claimant's refusal to follow recommended treatment is unreasonable and if so, what impact the refusal might have on the Claimant's disability status. Each case must be considered on its own particular facts, and the test in each case is whether the Claimant has acted reasonably having regard to his own particular circumstances and capabilities. The issue to be determined is whether it was reasonable for the Claimant not to have followed the recommended medical advice. The Claimant's lack of compliance must be viewed in the context of his

[4] *Lalonde v Canada (Minister of Human Resources and Development)*, 2002 FCA 211.

> circumstances. The family doctor identifies the Claimant's lack of motivation and the Claimant testified his depression left him unmotivated and lacking energy. I acknowledge the obligation that Claimants have to seek treatment and help themselves. The fact that he has not had the benefit of a family doctor since December 2017 has impacted his well-being and further complicated his care. In this particular circumstance, the lack of compliance is intertwined with his psychological illness. I have concluded that in light of the lack of primary care combined with his longstanding refractory psychiatric condition his refusal to follow treatment recommendations is not unreasonable, rather it is a symptom of his illness.[5]

The record indicates that the Respondent refused to comply with his doctors' treatment recommendations on more than one occasion. The General Division excused these refusals for two reasons: the loss of his family physician and a lack of motivation caused by his psychological illness. If the General Division had not attempted to assess the Respondent's explanation for declining prescribed medications, then the Minister would have had a better argument that there had been an error of law. However, the fact is that the General Division **did** analyze the reasons for the Respondent's noncompliance. One can disagree with this analysis or argue whether it is reasonable, but those are not among the grounds of appeal under section 58(1) of the DESDA.

[20] That said, although the General Division may have fulfilled is obligation under the law, I am persuaded that the General Division's analysis of the Respondent's noncompliance was compromised by material factual errors in its assessment of the evidence, as discussed below.

Issue 2: Did the General Division find, without evidence, that the Respondent's refusal to take prescription medication was a "symptom of his illness"?

[21] The General Division found that Respondent's refusal to take medicine was reasonable because his noncompliance was a "symptom of his illness."[6] However, I did not find any evidence to support this finding on the record. I have therefore concluded that the General Division based its decision an erroneous finding of fact made without regard for the material before it.

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[5] General Division decision, para 18.
[6] *Ibid*.

[22] There is no question that the Respondent suffers from depression and anxiety and that these conditions have robbed him of energy and motivation. Dr. Michael Lee, the Respondent's former family physician, wrote that his patient was "Depressed. No interest or ambitions to do anything."[7] However, I think the General Division took an unwarranted leap in logic when it found that the Respondent's psychological illnesses were responsible for his failure to take medications.

[23] In fact, the record indicates that it is not lack of motivation that accounts for the Respondent's noncompliance but his own considered opposition to pharmaceuticals. In May 2014, a consulting psychiatrist noted that the Respondent took Cipralex for a day and "stopped taking it because he did not like taking medications."[8] In an undated letter, the Respondent himself wrote, "I don't take any medication like antidepressants because I believe in natural products, so I take vitamin D3, liquid form, 10 drops or 10,000 units on tongue every morning. It works well and keeps me happy."[9] It also appears that the Respondent's aversion to medication was not just confined to psychoactive agents: in a letter dated July 20, 2017, Dr. Lee wrote that the Respondent was [n]ot taking any pain medications because doesn't want to take pills."[10]

[24] The General Division was aware that Respondent's noncompliance was about more than just lack of initiative, and it acknowledged as much in its decision:

> The Claimant said that he has suffered with depression from childhood. He took anti-depressant medication in 2014 and this made him feel sick and unable to eat for 12 days. He did not wish to take antidepressants because he did not believe in them. He took vitamin D which is a natural remedy and he felt that this was helping his psychological condition.

I question whether it was reasonable for the Respondent to permanently forswear an entire class of drugs based on the supposed side effects of a single antidepressant, taken for only a single day. In any event, it is clear that his noncompliance was rooted in his personal philosophy as

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[7] CPP Medical Report dated December 12, 2016, GD2-74.
[8] Consultation note by Dr. Alphie Pallan dated May 8, 2014, GD2-67.
[9] GD2-10.
[10] GD2-63.

much as anything else. Despite that, the General Division found that his lack of compliance was "intertwined with his psychological illness."

[25] In my view, this finding is not consistent with what was on the record. Dr. Lee wrote that the Respondent was "not interested to take medications,"[11] but the balance of the available evidence indicates that he was not taking prescription medicines, not because of lack of interest or motivation, but because he was actively opposed to them. Since the Respondent's testimony was largely inaudible on the recording, I am not sure what was said at the General Division hearing, although the General Division wrote that his testimony was "straightforward, thoughtful and consistent with the medical evidence." That may be so, and the General Division, as trier of fact, was within its rights to find the Respondent credible. However, it does not change the fact that the General Division's decision did not come to terms with striking evidence indicating that the Respondent's noncompliance was for reasons other than his psychological illness.

Issue 3: Did the General Division mischaracterize Dr. Lee's prognosis?

[26] On this question, I am satisfied that the General Division based its decision on an erroneous finding of fact.

[27] In the medical report that accompanied his patient's CPP disability application, Dr. Lee pronounced the Respondent's prognosis as "poor," adding that he was not interested in medication.[12] As discussed above, this statement, viewed in the context of evidence that the Respondent was an adherent of alternative medicine, suggests that Dr. Lee meant that his patient was **opposed** to medication, rather than merely **uninterested** in it. This impression is reinforced by Dr. Lee's July 2017 letter, in which the family physician repeated his prognosis ("poor") and added, "Patient not compliant with treatment plan." This explanatory statement, unlike the one in the earlier CPP medical report, carried with it an unmistakable suggestion that the Respondent's unpromising outlook had something to do with a lapse for which he, himself, was responsible.

[28] The General Division was therefore correct to find that Dr. Lee had detected a connection between the Respondent's impairment and his refusal to take antidepressants; however, Dr. Lee

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[11] CPP medical Report, GD2-76.
[12] *Ibid*.

did not say that the first explained the second. Rather, he seems to have suggested just the opposite—that the Respondent's refusal to take antidepressants was making his impairment worse.

[29] In submissions to this Tribunal, the Respondent argued that the General Division did not mischaracterize Dr. Lee's opinion: the family physician clearly stated that the Respondent's prognosis was poor, and any qualifications attached to this statement were irrelevant. I cannot agree. There is no doubt that Dr. Lee was pessimistic about the Respondent's recovery prospects, but what matters here is **why** he was pessimistic. If the Respondent's prognosis had been poor because his illness prevented him from seeking treatment, then the General Division's analysis would have been adequate under *Lalonde*. However, since the Respondent's prognosis was poor because he refused recommended treatment as a matter of principle, then the General Division's analysis fell short. Having misapprehended the evidence surrounding the Respondent's noncompliance, the General Division failed to assess the reasonableness of the **real** reason he was not taking medication.

REMEDY

[30] The DESDA sets out the Appeal Division's powers to remedy errors by the General Division. Under section 59(1), I may give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with directions; or confirm, rescind, or vary the General Division's decision. Furthermore, under section 64 of the DESDA, the Appeal Division may decide any question of law or fact that is necessary for the disposition of any application made under the DESDA.

[31] Under section 3 of the *Social Security Tribunal Regulations*, the Appeal Division is required to conduct proceedings as quickly as circumstances and considerations of fairness allow, but, in this case, I feel that the most appropriate course is to refer this matter back to the General Division for a new hearing.

[32] I have the power to give the decision that the General Division should have given, but I do not feel comfortable deciding this matter on its merits. Since substantial portions of the recording before the General Division are inaudible, the record before me is incomplete. The

General Division's primary mandate, unlike the Appeal Division's, is to weigh evidence and determine facts. As such, it is in a better position than I am to hear the Respondent's oral evidence and assess its reliability.

CONCLUSION

[33] For the above reasons, I am allowing this appeal because I find that the General Division based its decision on two erroneous findings concerning the Respondent's acceptance of treatment—or lack thereof. The record is not sufficiently complete to allow me to decide this matter on its merits, so I am referring it back to the General Division for redetermination. I am also directing the General Division to conduct an oral hearing, whether by teleconference, videoconference, or in person.

Member, Appeal Division

REPRESENTATIVES:	Viola Herbert, for the Appellant Terry Kirby, for the Respondent