Federal Court  Cour fédérale

Date: 20170216

Docket: T-2179-15

Citation: 2017 FC 193

Ottawa, Ontario, February 16, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

DIMCE CVETKOVSKI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act] for judicial review of a decision of the Appeal Division of the Social Security Tribunal [AD], dated November 30, 2015 [Decision], which denied the Applicant's application for leave to appeal a decision of the General Division of the Social Security Tribunal [GD].

II. BACKGROUND

[2] The Applicant is a 50-year-old male from the former Yugoslavia. At the age of 25, he fled the war in Yugoslavia and arrived in Canada as an illegal immigrant. After moving to Toronto, he obtained a degree in Computer Networking and Technical Support at Seneca College of Applied Arts and Technology. However, the majority of his previous employment has not been related to his field of study. Moreover, his employment has typically lasted only a few months, with the exception of his most recent experience as a security officer, which lasted three and a half years.

[3] The Applicant has a history of psychological disorders which has led to symptoms such as an inability to concentrate or relate to other people, a lack of interest and desire to perform duties, a lack of motivation and energy, and suicidal thoughts. In order to cope with his disorders, he has received treatment from multiple specialists. He also attends a weekly support group with the Manitoba Mood Disorder Association.

[4] Since 2011, he has been treated by Dr. Frederick Ross, a general practitioner, for chronic dysthymia, a type of depression, with antidepressants and supportive psychotherapy. Dr. Ross continues to provide treatment to the Applicant.

[5] In 2012, the Applicant was assessed by Dr. Nina Kuzenko, a psychiatrist, with a multi-axial diagnosis. In her assessment report, Dr. Kuzenko included a list of low or no-cost counselling services and resources available in the Applicant's community. The Applicant is not

currently treated by Dr. Kuzenko and does not attend any of the recommended counselling services.

[6] In 2014, the Applicant was treated by Dr. Cynthia Jordan, a clinical psychologist, for post-traumatic stress disorder [PTSD] and bipolar disorder with mood stabilizer medication. The Applicant is not currently treated by Dr. Jordan and has also ceased taking the mood stabilizer medication.

[7] In 2015, the Applicant was treated by Dr. Roslyn Golfman, a clinical psychologist, for depression and anxiety disorder. Dr. Golfman continues to provide treatment to the Applicant.

[8] The Applicant applied for a disability pension under the *Canadian Pension Plan*, SC 1985, c C-8 [*CPP*] on February 8, 2013. The application was denied on April 13, 2013 and again upon reconsideration on July 17, 2013. The matter was then heard by the GD, which denied the application a final time on September 3, 2015. In its decision, the GD found the Applicant did not meet the criteria for payment of a *CPP* disability pension because he had not demonstrated, on a balance of probabilities, that he had a severe and prolonged disability on or before his minimum qualifying period [MQP] of December 31, 2014.

[9] The Applicant then sought leave to appeal the GD's decision to the AD on the basis that the GD based its decision on erroneous findings of fact that it made perversely or capriciously or without regard for the material before it.

III. DECISION UNDER REVIEW

[10] In a Decision dated November 30, 2015, a Member of the AD refused the Applicant leave to appeal the GD's decision to deny the Applicant a *CPP* disability pension.

[11] The Applicant had sought leave to appeal on the ground enumerated in s 58(1)(c) of the *Department of Employment and Social Development Act*, SC 2005, c-34 [*DESD Act*], to the effect that the GD had based its decision on erroneous findings of fact that it made perversely or capriciously, or without regard for the material before it. As part of the Decision, the AD considered whether the appeal had a reasonable chance of success; that is, whether there was an arguable case.

[12] The AD found that the Applicant's submissions were not persuasive. The Applicant had argued that the GD misinterpreted facts, misunderstood the sequence of events, and ignored his attempts to address his depression and PTSD. The AD disagreed because the record demonstrated the GD had considered the Applicant's testimony regarding his attempts to treat his depression and PTSD, and the Applicant had not identified evidence that had been ignored.

[13] In its review, the AD found that the GD had valid reasons to reject the Applicant's explanations for discontinuing treatment sessions with Dr. Jordan, ceasing to take the mood stabilizing medication prescribed by Dr. Jordan without consultation, and failing to comply with the treatment recommended by Dr. Kuzenko and Dr. Ross. Furthermore, the AD determined that even if the GD had erred, which the AD did not find, the error was not material so as to affect the

outcome of the Decision. Thus, the AD concluded that the Applicant had not raised an arguable case and dismissed his application for leave to appeal.

IV. ISSUES

[14] The Applicant submits that the following are at issue in this application:

(a) Was the AD unreasonable in its conclusion that the Applicant:

i. Made insufficient efforts to cope with his disability?

ii. Disregarded the advice of medical professionals?

iii. Declined *pro bono* medical treatment?

iv. Discontinued taking medications?

(b) Did the AD err in denying the Applicant's application for leave to appeal the GD's decision of November 30, 2015?

V. STANDARD OF REVIEW

[15] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[16] The issues raised by the Applicant attract a reasonableness standard. The standard of review for any findings of fact by the Social Security Tribunal and for the interpretation of the *DESD Act* is reasonableness: see *Reinhardt v Canada (Attorney General)*, 2016 FCA 158 at para 15.

[17] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[18] The following provisions from the *DESD Act* are relevant in this proceeding:

Grounds of appeal	**Moyens d'appel**
58 (1) The only grounds of appeal are that	58 (1) Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision,	b) elle a rendu une décision entachée d'une erreur de droit,

whether or not the error appears on the face of the record; or	que l'erreur ressorte ou non à la lecture du dossier;
(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.	c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.
Criteria	**Critère**
(2) Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.	(2) La division d'appel rejette la demande de permission d'en appeler si elle est convaincue que l'appel n'a aucune chance raisonnable de succès
Decision	**Décision**
(3) The Appeal Division must either grant or refuse leave to appeal.	(3) Elle accorde ou refuse cette permission.

[19] The following provisions from the *CPP* are relevant in this proceeding:

When person deemed disabled	**Personne déclarée invalide**
42 (2) For the purposes of this Act,	42 (2) Pour l'application de la présente loi :
(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,	a) une personne n'est considérée comme invalide que si elle est déclarée, de la manière prescrite, atteinte d'une invalidité physique ou mentale grave et prolongée, et pour l'application du présent alinéa :
(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is	(i) une invalidité n'est grave que si elle rend la personne à laquelle se rapporte la déclaration régulièrement

incapable regularly of pursuing any substantially gainful occupation, and	incapable de détenir une occupation véritablement rémunératrice,
(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and	(ii) une invalidité n'est prolongée que si elle est déclarée, de la manière prescrite, devoir vraisemblablement durer pendant une période longue, continue et indéfinie ou devoir entraîner vraisemblablement le décès;
(b) a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person — including a contributor referred to in subparagraph 44(1)(b)(ii) — be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.	b) une personne est réputée être devenue ou avoir cessé d'être invalide à la date qui est déterminée, de la manière prescrite, être celle où elle est devenue ou a cessé d'être, selon le cas, invalide, mais en aucun cas une personne — notamment le cotisant visé au sousalinéa 44(1)b)(ii) — n'est réputée être devenue invalide à une date antérieure de plus de quinze mois à la date de la présentation d'une demande à l'égard de laquelle la détermination a été faite.
…	…
Benefits payable	**Prestations payables**
44 (1) Subject to this Part,	44 (1) Sous réserve des autres dispositions de la présente partie :
…	…
(b) a disability pension shall be paid to a contributor who has not reached sixty-five years of age, to whom who	b) une pension d'invalidité doit être payée à un cotisant qui n'a pas atteint l'âge de soixante-cinq ans, à qui aucune pension de retraite

	n’est payable, qui est invalide et qui :
(i) has made contributions for not less than the minimum qualifying period,	(i) soit a versé des cotisations pendant au moins la période minimale d’admissibilité,
(ii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if an application for a disability pension had been received before the contributor’s application for a disability pension was actually received, or	(ii) soit est un cotisant à qui une pension d’invalidité aurait été payable au moment où il est réputé être devenu invalide, si une demande de pension d’invalidité avait été reçue avant le moment où elle l’a effectivement été,
(iii) is a contributor to whom a disability pension would have been payable at the time the contributor is deemed to have become disabled if a division of unadjusted pensionable earnings that was made under section 55 or 55.1 had not been made;	(iii) soit est un cotisant à qui une pension d’invalidité aurait été payable au moment où il est réputé être devenu invalide, si un partage des gains non ajustés ouvrant droit à pension n’avait pas été effectué en application des articles 55 et 55.1;

VII. ARGUMENTS

A. *Applicant*

(1) Efforts to Cope with Disability

[20] The Applicant submits that the AD was unreasonable in its conclusion that he had made insufficient efforts to cope with his disability. On the contrary, the Applicant says he has sought treatment from numerous specialists, including Dr. Ross, Dr. Jordan, and Dr. Golfman. The Applicant has regular appointments with Dr. Ross and Dr. Golfman. With regards to Dr. Jordan,

the Applicant only ceased treatment with her because his insurance coverage provided very limited treatment that, according to Dr. Jordan, was too infrequent to be of value.

(2) Advice from Medical Professionals

[21] The Applicant argues that the AD was unreasonable in its conclusion that he had disregarded the advice of medical professionals. The Applicant contends that the list of community resources provided by Dr. Kuzenko was never offered to him; rather, it was provided to Dr. Ross who did not provide him with the list because he did not believe the resources would be helpful to the Applicant. As an example, one of the resources on the list, the Men's Resource Centre [MRC], advised the Applicant that they did not think they could help him much because they only dealt with issues of domestic violence and drug abuse.

(3) Refusal of *Pro Bono* Treatment

[22] The Applicant also submits that the AD was unreasonable in concluding he had refused Dr. Jordan's offer to treat him on a *pro bono* basis. While Dr. Jordan did offer to treat him on a *pro bono* basis, she advised him after only a few sessions that she did not believe she could provide further treatment.

(4) Discontinuance of Medication

[23] With regards to the issue of the discontinuance of prescribed medication, the Applicant contends that he has tried many medications for his disability and only discontinued taking a medication when he disliked the feelings it induced, which he has described as "numb" and "like

a zombie." Additionally, he has consulted with Dr. Ross prior to discontinuing any medication and he disputes the contention that he discontinued medication for the sake of discontinuation. Furthermore, he is currently taking Cymbalta, an antidepressant, which was prescribed by Dr. Ross.

(5) Denial of Leave to Appeal

[24] The Applicant submits that the AD erred in denying his application for leave to appeal and that there is a reasonable chance of success if the appeal is granted. He argues that he meets the requirements for qualification of a disability pension set forth in s 44(1)(b) of the *DESD Act*: he is under the age of 65; he is not in receipt of a *CPP* retirement pension; he is disabled; and he has made valid contributions to the *CPP* for not less than the minimum qualifying period of December 31, 2014.

[25] The Applicant says the evidence demonstrates that he has a severe and prolonged disability that renders him incapable of regularly pursuing any substantially gainful employment in accordance with s 42(2)(a) of the *CPP*. Multiple mental health professionals have provided various diagnoses that indicate the Applicant has a mental disability. For example, Dr. Kuzenko provided a medical report that assessed the Applicant with a multi-axial diagnosis that included dysthymic disorder, major depressive episode, social phobia and occupation problem, cluster B (borderline) traits, irritable bowel syndrome, currently on disability, few social contacts, and GAF 55-60. Similarly, Dr. Golfman stated that the Applicant experienced the clinical signs of an individual with depression and anxiety disorder. Additionally, Dr. Jordan diagnosed the Applicant with PTSD and bipolar disorder I.

[26] According to prior jurisprudence, it is "the incapacity, not the employment, which must be regular": see *Canada (Minister of Human Resources Development) v Scott*, 2003 FCA 34 [*Scott*] at para 7. Although the Applicant was previously employed, the employment was mundane, low-paying, and only lasted for short periods of time. Furthermore, his employment as a security officer ceased because of his disability. Aside from that last position, his incapacity to find long-lasting employment has been regular.

[27] In *Williams v Canada (Attorney General)*, 2010 FC 701 [*Williams*] at para 17, the Court stated that the severity of a disability must be considered in the "real world" context and not simply rest upon a conclusion that there exists employment for which the applicant is physically capable, without regard to the applicant's education, background or other factors. *Williams* also says, at para 19, that if there is evidence an applicant is capable of work, an applicant must demonstrate that efforts at obtaining and maintaining employment were unsuccessful due to the applicant's health condition.

[28] In the Applicant's case, he has been able to obtain employment but cannot maintain it for more than a few months due to his disability. The employment situation in which he held the position for a period of three and a half years was successful due to the minimal contact required with co-workers, superiors, and the public, but ultimately failed because it became too much for the Applicant to handle with his disability. This aligns with Dr. Golfman's report in which the Applicant is described as "anxious, depressed, and with no sense of hopefulness that he could be affective in life" and "sulking, moody…induces others to react in a similarly inconsistent manner… tends to be overly sensitive and defensive." The symptoms described in Dr. Golfman's

report make it difficult for the Applicant to maintain relationships with people and therefore maintain employment as he struggles to work with others. Furthermore, Dr. Jordan noted that "ordinary points of disagreements in the work place evoked involuntary rage responses."

[29] Section 42(2)(a) of the *CPP* also describes a disability as prolonged if it is likely to be long continued and of indefinite duration. Although Dr. Golfman and Dr. Kuzenko did not comment on the Applicant's future prognosis, Dr. Jordan wrote in her report that she did not believe the Applicant would be able to work for at least one year. Dr. Jordan believed that the Applicant would need time off; however, at the time of the report, he had already been unemployed for almost two years. Despite the assistance of medical professionals, the Applicant's disability has rendered him unable to return to employment.

[30] The Applicant submits that his disability is both severe and prolonged and requests an order granting his application for leave to appeal the Decision on the grounds that the AD committed a reviewable error in their refusal of his application for leave to appeal.

B. *Respondent*

(1) Unsupported Information and Arguments

[31] As a preliminary issue, the Respondent states that some of the Applicant's information and arguments are unsupported by the record. Judicial review is conducted based on the certified copy of the record of the proceedings before the tribunal and new evidence is not admissible except in limited situations, which do not apply to the present case: see *Bernard v Canada*

(*Revenue Agency*), 2015 FCA 263 at paras 31-32 [*Bernard*] and *Connelly v Canada (Attorney General)*, 2014 FCA 294 at paras 6-7. Thus, since Dr. Golfman's letter of February 5, 2016 was not before the GD, it should not be admitted as evidence. Similarly, Dr. Golfman's medical report and treatment of the Applicant was also not before the GD and should not be considered by the Court.

[32] Next, the Respondent takes issue with the contradictions in the Applicant's arguments. The Applicant makes three claims that are unsupported by the record: Dr. Jordan and the Applicant agreed that there was little treatment that could be provided by Dr. Jordan; Dr. Jordan advised the Applicant that because his insurance coverage limited him to two visits annually, the visits would not be of value and the treatment should cease; and Dr. Jordan advised the Applicant that she could not provide useful treatment for him. The first two claims are unsupported by citations and although the latter claim cites the Applicant's affidavit, the citation does not confirm the claim. Furthermore, the GD's decision refers to the Applicant's testimony at the GD hearing where the Applicant interpreted a reply of Dr. Jordan's email to indicate that two annual visits would "not accomplish much and it would not pay to see her." Thus, the Respondent submits that the Applicant's arguments in relation to why his explanation to discontinue treatment with Dr. Jordan are weakened.

(2) Test for Severe and Prolonged Disability

[33] The Respondent cites jurisprudence that states the severity of a disability should be determined by the Applicant's incapacity to find any substantially gainful occupation, not the incapacity to perform his usual job: see *Scott*, above, at para 7. An applicant must demonstrate a

serious health condition and, in the face of evidence of work capacity, that efforts to obtain and maintain meaningful employment have been unsuccessful by reason of that health condition: see *Inclima v Canada (Attorney General)*, 2003 FCA 117 at para 3. The capacity to work is indicated by the performance of part-time work, modified activities, sedentary occupations, and school attendance: see *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 at paras 14-15 and *McDonald v Canada (Human Resources and Skills Development)*, 2009 FC 1074 at para 14. Furthermore, applicants who refuse to undergo recommended medical treatment may be disentitled to disability pensions: see *Lalonde v Canada (Minister of Human Resources Development)*, 2002 FCA 211 at para 19.

(3) Reasonableness

[34] The Respondent submits that the AD's Decision is reasonable and there is no error that warrants the intervention of the Court.

[35] In the Decision, the AD correctly applied the law regarding leave to appeal and clearly identified s 58 of the *DESD Act* as the relevant test that must be applied in the determination of leave to appeal. The AD also referred to the meaning of the reasonable chance of success standard required by the *DESD Act* as an arguable case at law, as determined by the Federal Court of Appeal in *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41 at para 37 and *Fancy v Canada (Attorney General)*, 2010 FCA 63. Additionally, the AD was aware of the Applicant's main argument in the application for leave to appeal and gave clear reasons as to why it did not find a reasonable chance of success that warranted a grant of leave to appeal.

[36] The Respondent argues that the AD assessed the evidence and reasonably found no error of fact in the GD's decision. The AD's decision to reject the Applicant's argument that his evidence had been misinterpreted is reasonable because the GD's decision demonstrates that the GD considered the Applicant's testimony regarding his attempts and efforts to treat his depression, and because the Applicant did not set out the steps he had taken that had been ignored by the GD.

[37] Additionally, it was reasonable for the AD to accept the GD's rejection of the Applicant's explanations for discontinuing treatment with Dr. Jordan as too expensive because Dr. Jordan had been willing to treat him on a *pro bono* basis.

[38] The AD was also reasonable in finding that the GD did not err in concluding the Applicant failed to comply with treatment recommendations because the Applicant had testified he did not implement Dr. Kuzenko's recommendations, including usage of the free resources in the community. Although the Applicant may now be receiving treatment with Dr. Golfman, this evidence was not before the GD.

[39] Furthermore, the AD clearly stated in its reasons that even if the GD had erred in its finding that Dr. Kuzenko's treatment recommendations had not been implemented, any error was not material enough to have changed the decision if the error had not been made. Therefore, it was reasonable for the AD to find that s 58 of the *DESD Act* was not engaged since the Applicant had not raised any grounds recognized by the *DESD Act* and the AD.

[40] Based on the evidence, it was reasonable for the AD to conclude that the Applicant's application for leave to appeal had no reasonable chance of success because the result was within a range of acceptable outcomes on the facts and the law before the AD. Thus, the Respondent submits that this application for judicial review should be dismissed.

(4) Style of Cause

[41] The Respondent requests an Order that the named Respondent should be changed to the Attorney General of Canada to reflect the proper style of cause pursuant to the *Federal Courts Rules*, SOR/98-106.

VIII. ANALYSIS

A. *General*

[42] In his appeal to the AD, the Applicant's stated grounds were:

> 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

[43] The Applicant's grounds for a reasonable chance of success were:

> CONNIE DYCK – MEMBER OF THE GENERAL DIVISION OF INCOME SECURITY SECTION MISINTERPRETED FACTS AND MISUNDERSTOOD SEQUENCE OF EVENTS IN MY CASE. SHE BELIEVES THAT I DIDN'T MAKE ENOUGH EFFORTH TO DEAL WITH MY DEPRESSION AND PTSD AND THAT I IMPROVIZED AND MADE MY OWN DECISIONS REGARDING THE MEDICATIONS THAT I TOOK[.] I NEVER REFUSED ANY TREATMENT AND ANY FAILURE IS NOT ONLY MINE BUT OF THE HEALTH CARE

> SYSTEM TOO, WHICH WAS SLOW TO RESPOND WITH THE BEST SOLUTIONS THAT COULD PROVIDE.)
>
> [errors in original]

[44] These grounds are set out accurately in the AD Decision of November 30, 2015 that is the subject of this judicial review application.

[45] The AD's analysis is as follows:

> [8] The Appeal Division is not persuaded of the Applicant's position. While the Applicant has submitted that his evidence has been misinterpreted, this argument is not supported by the decision which demonstrates that the General Division Member considered the Applicant's testimony regarding his attempts to treat his depression and PTSD. Nor has the Applicant set out what steps he took that the Member ignored.
>
> [9] To the contrary of the Applicant's contention the Member found that there was valid reason to reject the Applicant's explanations for why he did not continue treatment sessions with Dr. Jordan, when she had been willing to treat him on a *pro bono* (free) basis. The Appeal Division finds no error in the Member's assessment of this evidence.
>
> [10] The General Division Member concluded that the Applicant stopped taking mood stabilizing medication without consulting Dr. Jordan. The Applicant disputes this finding. However, this was not the only finding concerning the Applicant's failure to adhere to treatment recommendations that the General Division made.
>
> [11] The General Division Member found that the Applicant had also failed to comply with treatment recommendations made by Dr. Kuzenko as well as those that had been made by his family physician, Dr. Ross. Thus, even, if the General Division Member had erred, which the Appeal Division does not find, the error is not so material to the outcome of the decision that it would have changed it. The General Division did record that the Applicant testified that, as of the date of the hearing, he had not implemented Dr. Kuzenko's treatment recommendations for counselling, even though Dr. Kuzenko had provided him with a list of free resources

> for such counselling in the community (para. 12). Accordingly, the Appeal Division is not satisfied that the Applicant has raised an arguable-case in this regard.

[46] In his judicial review application before the Court, the Applicant alleges the following reviewable errors:

> a. The Tribunal was unreasonable in its conclusion that Mr. Cvetkovski has made insufficient efforts to cope with his disability;
>
> b. The Tribunal was unreasonable in its conclusion that Mr. Cvetkovski disregarded the advice of medical professionals;
>
> c. The Tribunal was unreasonable in its conclusion that Mr. Cvetkovski declined pro-bono treatment;
>
> d. The Tribunal was unreasonable in its conclusion that Mr. Cvetkovski discontinued taking medications.
>
> e. The Tribunal erred in denying Mr. Cvetkovski's Application for leave to appeal in the decision of November 30, 2015.

[47] As the record makes clear, the AD considered the Applicant's appeal on the basis of the grounds of appeal put forward by the Applicant which were that the GD had breached s 58(1)(c) of the *DESD Act* because the GD had misinterpreted facts and misunderstood the sequence of events in that the Applicant did make attempts to address his depression and PTSD, and that he did not improvise and make his own decision about medication and never refused treatment. As these were the only grounds of appeal that the Applicant placed before the AD, the issue before the Court in this application is whether the AD erred in denying the Applicant's leave to appeal.

[48] In considering the Applicant's leave to appeal, the AD reviewed whether there was some evidence in the record that was before the GD that would support the statutory ground of appeal under s 58(1)(c) of the *DESD Act*. If the AD is satisfied that the appeal had no reasonable chance of success, the AD must refuse to grant leave to appeal. See *Canada (Attorney General) v Hoffman*, 2015 FC 1348 at para 44.

[49] Before me, the issue is whether the AD's Decision not to allow the appeal was reasonable. See *Tracey v Canada (Attorney General)*, 2015 FC 1300 at paras 17-23.

B. *Insufficient Efforts to Cope with Disability*

[50] The Applicant argues that the "Tribunal" was unreasonable in its conclusion that he has made insufficient efforts to cope with his disability.

[51] In order to support this argument, the Applicant has placed before me evidence that he has sought treatment from Dr. Golfman. This is not evidence that was before the GD or the AD and so it is not proper evidence before me because new evidence is not, except for a few exceptions that do not apply here, admissible on judicial review. See *Bernard*, above, at paras 31-32.

[52] The Applicant points out that the evidence before the GD showed that he sought treatment from Dr. Ross and Dr. Jordan. Dr. Ross had prescribed medications to deal with his depression and the Applicant says that Dr. Jordan advised him that his insurance coverage did not provide for enough treatment and that she did not think infrequent visits to see her would be

of any value, so that this effectively ended his treatment. The Applicant provides no citation to support his claims about what Dr. Jordan advised in this regard.

[53] As the AD points out in its Decision, the GD based its conclusions on this issue on the following evidence:

(a) Dr. Kuzenko, a psychiatrist at the Health Science Centre who the Applicant saw on one occasion, wrote a report to Dr. Ross, the Applicant's family physician and provided a list of numerous low or no cost services available in the community for the Applicant;

(b) Dr. Ross also recommended that the Applicant seek counselling;

(c) At the time of the Decision, the Applicant had not followed these recommendations;

(d) Dr. Jordan's report of March 2014 revealed that she was aware of the Applicant's insurance coverage issues but that she was willing to provide PTSD therapy for the Applicant on a *pro bono* basis. The Applicant had not, at the time of the Decision, returned to Dr. Jordan and so had had no treatment for his PTSD;

(e) The Applicant had failed to follow his doctor's recommendations that he pursue specialist treatment from a counsellor and/or therapy service.

[54] As the AD makes clear in its Decision, the Applicant did not, in his appeal, "set out what steps he took that the [GD] ignored."

[55] The GD decision is based upon this basic issue:

> [33] There is no question that the [Applicant] suffers from significant conditions and limitations. The difficulty, however, is that the [Applicant] has failed to make reasonable efforts to mitigate and deal with these conditions.

[56] The position of CPP has been consistent throughout its dealings with the Applicant. In its decision of April 18, 2013, CPP informed the Applicant that it could not pay him disability benefits because:

> - Your doctor reported on February 18, 2013 that you had a poor prognosis however; he also reported that you have no limitations and you are being treated with medications and psychotherapy. It is reasonable to expect that after a suitable treatment period, you should improve and be able to return to some type of work suitable to your limitations.
>
> - Your psychiatrist reported on October 16, 2012 that you have some long standing issues that you need to deal with however; he also reported that your symptoms have stabilized and you have several positive coping mechanisms in your life. This information supports that you should continue to improve and be able to return to some type of work.
>
> - You reported in your questionnaire dated October 16, 2012 that you were waiting for a referral to a counselor. It can be anticipated that with treatment your condition should improve.

[57] The Reconsideration Adjudication Summary and Decision of July 17, 2013, makes the same points:

> **Analysis:**
>
> 46 year old client diagnosed with chronic dysthymia and major depressive disorder. Completed high school and has college training as a network support specialist. Last worked as a security officer. Date stopped work and claim date May 2012; LPDOO December 2014. A review of the information on file does not demonstrate a medical condition of such severity at [*sic*] to prevent all types of work for the foreseeable future and the decision is maintained.
>
> - Dr. Kuzenko, psychiatrist, reports on October 16, 2012 that client requires counselling to address his childhood experiences and ongoing difficulties with those experiences as they are the root cause of his depression. In a July 16, 2013 phone conversation with the client he reports that he is still waiting for an appropriate referral to begin counselling and

> that he had some success with counselling in 1994 after which he went on to successfully complete his college education. This information supports that further treatment is still pending that may offer improvement in the client's condition and a return to work in the foreseeable future.
>
> - Dr. Kuzenko, psychiatrist. also makes several recommendations for pharmacotherapy in the October 16, 2012 report. The client reports in a July 16, 2013 phone conversation that there have been no changes or additions to his medications since Dr. Kuzenko's assessment and report. This information also supports that further treatment options are still available that may offer some improvement in the client's symptoms and a return to work in the foreseeable future.
>
> - Since it does not appear that the client has yet participated in any of the treatment recommendations made by Dr. Kuzenko, psychiatrist, in the October 16, 2012 report there are still numerous treatment options available to the client that may result in improvement and return to some type of work in the foreseeable future.

[58] In his responses, the Applicant has made it clear that he doesn't believe that any treatment will work. For example, in his appeal to the GD received July 29, 2013, he submits as follows:

> On July 23rd, 2013 1 received a letter from CPP informing me that my appeal to their decision for CPP benefits has been denied. The explanation given was that my condition doesn't meet the criteria of being both severe and prolonged. If more than 20 years of continuous failure to find a suitable and long term employment doesn't qualify for "long term" and "severe" – I don't know what will.
>
> The other rationale used for their decision to deny my appeal was that I haven't exhausted all the possible treatments that were suggested by Dr. Kuzenko - a psychiatrist that I saw on October 26, 2012.
>
> Well, I guess all the possible treatments could never really be exhausted - there must be thousands of combinations of counseling and medications that can be tried.

> What I am trying to say is that based on my previous experiences - counseling and drug therapies dating back to 1994 – I don't have any basis for optimism that any future treatment will succeed. Ms. Charlotte St. John - the medical adjudicator who made the decision to deny my appeal, used the example of my previous counseling in 1994 as a basis for optimism. According to her, my treatment in 1994 resulted in uplifting my spirits and allowing me to graduate from College. She failed to notice that my college diploma didn't do anything to improve my chances for long term and sustainable employment.
>
> I lived with this condition for over 30 years now - 20 of which were spent here in Canada. After 20 years of experiments of trying to find myself in different types of occupations and professions - I am ready to concede a defeat. CPP can be optimistic about my prospects of finding a solution - and I must agree - possibilities always exist, but in my case those possibilities are only theoretical. My track record over the past 20 years doesn't leave much room for optimism.
>
> Furthermore, if at some time in the past I had some hope that things can improve, that hope is now pretty much gone. I don't have any enthusiasm left for more experiments. I have tried everything: worked temp jobs, industrial, security, electronics technician, IT technician and other odd jobs that I've done over the years. The reason why I failed at all of them was because of my psychological condition. The severe depression has prevented me from forming any kind of relations both in the workplace and in my private life.
>
> Based on this, I am asking you to reconsider my application for CPP. When I came to Canada as a 25 year old, my ambitions didn't include one day ending up on CPP benefits. No matter what your decision is going to be - it will be unfavorable to me - one way or the other. I am asking you to make a decision that is going to be less unfavourable for me. I would have preferred to have achieved long term stable employment and be productive both for me and for the society. Having failed at that, it leaves me with no other option but to ask for CPP assistance.

[59] This letter does not mention the periods when the Applicant has worked and it makes clear that the Applicant is only interested in "suitable and long term employment." It also makes clear that the Applicant, an intelligent man according to his doctors, believes that his own self-

assessments are what should carry the day. His despondency is entirely understandable, but he needs his doctors to say that there are no treatments that will help and that he has no capacity for any substantially gainful employment. None of the medical evidence before the GD and the AD says this. It is the Applicant who has decided that there is no point in trying. Given his depression and PTSD, it is not surprising that he feels this way, but his despondency is part of his medical problem and he needed to produce medical evidence to support his position that his condition cannot be improved and he cannot work. He has not done this.

[60] Dr. Kuzenko's psychiatric report of October 16, 2012 to Dr. Ross contains the following recommendations:

> **RECOMMENDATIONS:**
>
> 1) I discussed with Mr. Cvetkovski that I believe that his childhood experiences and his ongoing difficulties with those experiences are the root cause of his depression. I think it will be difficult for him to make headway in his depression without addressing these long-standing traumas. He was initially very resistant to seeking counselling to work through some of these issues but as we discussed it a bit further, I wondered if he was beginning to come around to the idea. I suggested that he discuss this more with you. If he has coverage for counselling through an Employee Assistance Program, then I would suggest he begin by seeking help there. If he does not have EAP, then he could seek out counselling through any number of community resources. I have appended a list of low or no cost counselling services available in the community. Please provide him with this list and please feel free to use it for any other patients who might need these services. As you can see, there are a variety of resources located throughout the city. In particular for Mr. Cvetkovski however, I would recommend the Men's Resource Centre as a place to start. Please also point out to him the available Crisis Services as listed on page 2 of the handout.
>
> 2) Although I do not believe chat Mr. Cvetkovski has Bipolar Disorder, it might be reasonable to try a mood stabilizer at this point as an augmentation agent for treatment resistant depression. There is Level I evidence to support Lithium augmentation; a

starting dose would be 600 mg daily for one week, increasing to 900 mg at hs for one week, then titrating to adequate serum levels. Please note that serum levels should be measured as a 12 hour trough level and this is best done first thing in the morning. If there is no response after 3 to 4 weeks, alternative strategies could be considered. Also if Mr. Cvetkovski is opposed to doing blood work then alternate strategies could be considered.

3) There is also Level I evidence to support add-on treatment with atypical antipsychotics for treatment resistant depression. There have been placebo-controlled randomized control trials demonstrating efficacy for both aripiprazole as well as olanzapine. Aripiprazole has the advantage of having less metabolic side effects compared to the other atypical antipsychotics. The starting dose would be 2 mg daily. American literature on the use of aripiprazole in adjunctive treatment for major depressive disorder indicates a recommended dose of 5 to l0 mg per day.

4) Yet another option that you could consider would be to augment with triiodothyronine as it has shown benefits in open trials and RCT's. Treatment is usually initiated at a dose of 25 mcg daily and increased to 50 mcg after one week if necessary. If there is no response after two weeks at the higher dose another strategy should be considered. This is a generally well tolerated medication and may have the advantage of acting in a more rapid manner than some of the other strategies that I have offered, however the evidence is less robust for it.

5) Mr. Cvetkovski did not perceive any benefit from the bupropion however I have often encountered recall bias when patients self-rate their symptoms. You might consider use of a standardized scale from time to time such as a Beck Depression Inventory to objectively measure whether or not he has had a symptom improvement. The strategies that I have mentioned above are intended to be augmentation and not monotherapy strategies therefore he should remain on an antidepressant that has had some sort of positive effect. If you think that the bupropion has had some positive effect then I would leave him at his current dose and add one of the adjunctive treatments. Alternatively, you could switch him to another first line medication such as an SSRI or an SNRI. Unfortunately we don't have complete records from his treatment in Toronto. If you could obtain these then that might give you a better idea of which medications he has not tried yet. However, agents that have demonstrated evidence for superiority include; duloxetine, escitalopram, mirtazapine, sertraline and venlafaxine.

> 6) If you have not recently checked his thyroid function, I would recommend doing this to rule out hypothyroidism as a contributing cause.

[61] Read in total, Dr. Kuzenko's letter does not support the hopelessness that the Applicant appears to feel, and she does point out that "I have often encountered recall bias when patients self-rate their symptoms."

[62] The record is clear that the GD was not unreasonable in its conclusion that the Applicant had, on the basis of the evidence provided, made insufficient efforts to cope with his disability, and the AD was not unreasonable in its conclusion that the Applicant had not, on this issue, demonstrated that his appeal would have any chance of success.

C. *Disregarding the Advice of Medical Professionals*

[63] The Applicant argues that the "Tribunal" was unreasonable in its conclusion that he disregarded the advice of medical professionals.

[64] The Applicant says that he was not provided with a list of the resources recommended by Dr. Kuzenko and that, once he became aware of it, he raised the matter with Dr. Ross, who told him that he did not pass on the list because he did not believe it would be helpful to the Applicant. He says Dr. Ross did advise him of the MRC which he attended on one occasion when a representative of the MRC advised him that they could not help.

[65] In his affidavit for this application, the Applicant's evidence about Dr. Kuzenko's list is as follows:

> 9 Then there is the case of Dr. Kuzenko, a psychiatrist whom I saw sometime in the fall of 2012. To hear my legal adversaries gush over Dr. Kuzenko report, you'd think that she is the second coming of Carl Jung. Trust me, she is not. She has the audacity to tell me to my face that my 3 decades plus struggle with depression is not a big deal. To me, that's a display of colossal insensitivity bordering (actually moving right into) incompetence territory.
>
> 10 Apparently Dr. Kuzenko produced a list of recommendations of how to deal with my mental issues. I have never seen this list. It was passed from Dr. Kuzenko to my family physician Dr. Frederick Ross directly. On my next visit to Dr. Ross – after my appointment with Kuzenko, he failed to even mention that list of recommendations. The reason being, he was totally unimpressed with her report. He said that "There is nothing there", meaning nothing useful in the report of Dr. Kuzenko.
>
> [errors in original]

[66] This evidence is not clear. If Dr. Ross "failed to even mention that list of recommendations," then the Applicant has no way of knowing that he was "completely unimpressed with the report" and that he said "'There is nothing there,' meaning nothing useful in the report of Dr. Kuzenko." The Applicant does not give evidence of any other occasion when this was said, or how he became aware of the report. He certainly is aware of it because he disparages it in this affidavit:

> 11 My legal adversaries seem to love it though. They are preaching the report of Dr. Kuzenko like it's the gospel. I've been seeing some of the top psychologists in the province of Manitoba, people with PhD's in psychology, like Dr. Jordan and Dr. Golfman. Yet, somehow my greatest sin has been not seeing some of the few counselors from Dr. Kuzenko report. My legal adversaries seem to think that quantity has a quality of its own. The more counselors I see, the better my prospects of recovery are. Or the more counselors I see, the greater effort my legal

> adversaries will have to put in finding an excuse not to give me the protection of the CPP. That's how I see it.
>
> [errors in original]

[67] This is argument and opinion, not fact. There is insufficient evidence before me to support the Applicant's assertion made in written argument that Dr. Ross dismissed Dr. Kuzenko's report or that the Applicant did not become fully aware of Dr. Kuzenko's recommendations.

[68] There is also no evidence to support the Applicant's assertion in written argument that he went to the MRC and was told they could not help. In his affidavit of January 27, 2016, he does not refer to the MRC. The MRC is only referenced in his memo at para 27 (and Dr. Kuzenko's report in Recommendation #1). The Applicant claims in his memo that the MRC told him they did not deal with the disabilities he exhibited. The GD's decision expands on this:

> The Appellant stated that he did check out one counsellor advised to him by Dr. Kuzenko which provided free services and he was told that they only dealt with issues of domestic violence and drug abuse issues. They stated that they would not refuse to see him, but they did not think they could help him much.

[69] The Applicant concedes that Dr. Jordan offered to treat him on a *pro bono* basis but that, after a few treatments, she didn't believe she could provide any further treatment for him.

[70] The Applicant offers the following in his affidavit to support this assertion:

> 6 Another argument that my legal opponents has made is that I haven't made enough efforts to deal with my depression, so therefore that is the proof that I don't have one. Their contention is that I have sabotaged or obstructed in some ways, the efforts of the

> medical professionals whose help I have sought. They use the example of Dr. Cynthia Jordan – a psychologist who offered her professional help on a pro-bono basis and I have somehow spurned that offer and this confirmed that I have not dealt with my depression in a proper way.
>
> 7 That is simply not true. Both Dr. Cynthia Jordan and I realized that we reached the end of the road of usefulness for her therapy sessions. So I moved to a new psychologist which I am seeing now – Dr. Rosalyn Golfman.
>
> [errors in original]

[71] There are no facts cited to support the assertion that Dr. Jordan felt that the end of the road had been reached. Nothing in Dr. Jordan's letters supports this and it was not evidence before the GD or the AD. Hence, it is not relevant for this appeal, even if it had been substantiated in some way. Dr. Jordan's letter says that "Because his insurance coverage was uncertain, sessions were regular but not as frequent as either of us would have liked." It also states that: "I am planning to treat him for PTSD on a pro bono basis once he is stabilized on the new medication."

D. *Discontinuing Medication*

[72] The Applicant says that he has only discontinued taking a medication when he disliked the way it made him feel and that, when he has done so, he has always consulted with Dr. Ross.

[73] The Applicant's evidence on this issue for this application is as follows:

> 13 The other mortal sin that I've committed, according to my legal opponents is to discontinue taking the Teva-Quetiapine antipsychotic and mood stabilizing medication, which again according to them, - Dr. Jordan prescribed. Do they even know how the Canadian Health Care system works here in Manitoba?

> Dr. Jordan didn't prescribe that medication. She doesn't have the power to do so. She recommended it to Dr. Ross who actually wrote the prescription. I took that medication for over a year and after realising that it's turning me into a zombie, I consulted Dr. Ross who changed the medication to Cymbalta, which is what I am taking right now.

[74] The GD made the following finding:

> [38] The tribunal has determined that the Appellant has failed to follow obviously appropriate medical recommendations from his treating physicians, and that this failure has deleteriously affected, and continues to deleteriously affect, his medical conditions. The tribunal finds that further treatments options are available.

[75] The Applicant's evidence on Cymbalta on this issue before the GD was that:

> [18] The Appellant stated that the mood stabilizer medication that Dr. Jordon prescribed to him, he stopped taking because he was not happy with the effects. He stated that his family doctor prescribed Cymbalta approximately 8 months ago. He stated that this was not working either, so he was prescribed Pristiq for about 1 - 1.5 months. He felt this was not working, so he resumed taking Cymbalta.

[76] So the Applicant is not being accurate in his affidavit as to what the GD decided. The issue was not that he stopped taking a drug without consulting Dr. Jordan, but that the Applicant "has failed to follow obviously appropriate medical recommendations from his treating physicians" generally, and not that Dr. Jordan wrote a prescription which he did not follow. This is why the AD says "this was not the only finding concerning the Applicant's failure to adhere to treatment recommendations that the General Division made."

E. *Errors in Deciding Leave to Appeal*

[77] The Applicant also argues in a general way that the AD erred in refusing his leave to appeal application.

[78] Much of his argument relies upon the evidence of Dr. Golfman's report which was not before the GD or the AD and is not properly before this Court.

[79] The rest of the argument rests upon a disagreement as to what the Applicant's history and medical evidence reveal about his ability to work. He contends that "he is disabled as defined under the Canada Pension Plan Act."

[80] However, this is not the issue before the Court. The Court must decide whether the AD has committed a reviewable error when it refused the Applicant's application for leave to appeal. The Applicant's disagreement with the findings and conclusions of the GD and the AD is not sufficient to support a reviewable error.

[81] As the Applicant concedes "none of the medical health professionals have made a future prognosis with regards to his ability to regularly pursue employment." Dr. Jordan does say that "I do not anticipate that Mr. Cvetkovski will be able to work for at least a year, if then." But, this does not mean there will never be a possibility that he could regularly pursue employment.

[82] This leaves the Applicant's own prognosis in his written arguments:

> 57. Mr. Cvetkovski has dealt with depression the majority of his life and despite treatment from medical professionals. He quit his job and has not been able to return. Mr. Cvetovski contends that his disability is both severe and prolonged. There is no hope of returning to the workforce in the future.

[83] All of his doctors have recognised that the Applicant suffers from depression and PTSD and needs help. None of them has said that "there is no hope of returning to the workforce in the future." The Applicant cannot expect to secure *CPP* disability benefits based upon self-diagnosis.

[84] But more importantly for this review application, the Applicant has not demonstrated that the AD made a reviewable error when assessing his request for leave to appeal the decision of the GD. Consequently, I have no choice but to dismiss the application before me.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. The style of cause is amended to reflect the Attorney General of Canada as the sole Respondent.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2179-15
STYLE OF CAUSE:	DIMCE CVETKOVSKI v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	JANUARY 18, 2017
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	FEBRUARY 16, 2017

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