

Federal Court



Cour fédérale

Date: 20160908

Docket: T-1521-15

Citation: 2016 FC 1016

Ottawa, Ontario, September 8, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

CORY NEWTON

Applicant

and

**THE ATTORNEY GENERAL OF CANADA
AND THE COMMISSIONER OF
CORRECTIONS AND THE HEAD OF THE
ONTARIO REGIONAL PHARMACY**

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] Cory Newton is an inmate of Warkworth Institution, a federal penitentiary located in Ontario. He submitted a grievance to the Senior Deputy Commissioner of the institution concerning the refusal of the Correctional Service of Canada [CSC] to pay for prescribed medication pursuant to s 86(1)(a) of the *Corrections and Conditional Release Act*, SC 1992, c 20

[CCRA]. The Senior Deputy Commissioner denied Mr. Newton's grievance because the medication is available "over the counter" [OTC], and is not covered by most federal, provincial or territorial drug plans available to the general public. Mr. Newton has sought judicial review of that decision.

[1] For the reasons that follow, I have concluded that the Senior Deputy Commissioner reasonably found that Mr. Newton's medication was not covered by the CSC drug plan. The application for judicial review is therefore dismissed.

II. Background

[2] Mr. Newton is serving an indeterminate sentence at Warkworth Institution. In August 2012, he was diagnosed with dry age-related macular degeneration [AMD], which may cause impaired central vision and eventual blindness. Mr. Newton's optometrist recommended that Mr. Newton receive Vitalux/Omega. On August 22, 2012, the institutional physician wrote a prescription for Vitalux, which was substituted with the generic drug Ocuvite by the regional pharmacy. Mr. Newton received the tablets the same day, and continued to receive them free of charge until July 2013, when he was informed that he would have to pay for the tablets himself. On January 2, 2015, Mr. Newton filed a third level grievance in which he alleged that he should receive the Ocuvite tablets free of charge as "essential health care" under s 86(1)(a) of the CCRA.

III. Decision under Review

[3] Mr. Newton's grievance was denied by the Senior Deputy Commissioner on April 20, 2015. In her decision, the Senior Deputy Commissioner acknowledged that Mr. Newton's condition had been diagnosed in August 2012, that an optometrist had recommended Vitalux/Omega tablets, and that the institutional physician had written a prescription accordingly.

[4] However, based on her review of the Ocuville website, the Senior Deputy Commissioner found that the tablet is part of a "family of eye vitamins & mineral supplements." She also received advice from CSC National Headquarters that Ocuville is not covered by the CSC "as per community standards as it is considered an OTC medication that is not covered by most publicly funded Federal, Provincial or Territorial drug plans."

[5] In response to Mr. Newton's claim that he could not afford Ocuville tablets, the Senior Deputy Commissioner referred to Commissioner's Direction 860, *Offender's Money*, and observed that Mr. Newton had a responsibility to budget his finances to ensure that he had funds for authorized expenditures. She also noted that, pursuant to another directive, inmates receive a credit of \$4.00 per pay period for the purchase of health and hygiene products, and that Mr. Newton was employed within the institution and was receiving "Level A pay".

[6] The Senior Deputy Commissioner concluded that there are no available treatments for Mr. Newton's medical condition, and because Ocuville is considered an OTC medication that is

not funded by other public drug plans, it is not funded by the CSC. She therefore denied Mr. Newton's grievance.

IV. Issues

[7] This application for judicial review raises the following issues:

- A. Is the affidavit of Ian Irving admissible in these proceedings?
- B. Is the decision of the Senior Deputy Commissioner to deny Mr. Newton's grievance reasonable?

V. Analysis

A. *Is the affidavit of Ian Irving admissible in these proceedings?*

[8] The Respondent filed the affidavit of Ian Irving, Regional Manager, Clinical Services for the Ontario Region of CSC. The affidavit provides information regarding CSC's legislative and policy mandate for the provision of health services to inmates, CSC's National Formulary of medications available to inmates, and Mr. Newton's ineligibility to receive OcuVite tablets in accordance with CSC's Formulary.

[9] As a general rule, in an application for judicial review the evidentiary record before the Court is restricted to the evidentiary record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Association of Universities and Colleges*] at para 19). The essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court

(*Association of Universities and Colleges* at para 19, citing *Gitxsan Treaty Society v Hospital Employees' Union*, [2000] 1 FC 135 (FCA) at pages 144-45; *Kallies v Canada*, 2001 FCA 376 at para 3; and *Bekker v Canada*, 2004 FCA 186 at para 11).

[10] As the Federal Court of Appeal held in *Association of Universities and Colleges* at para 20, “[t]here are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker.” Three exceptions recognized by the Court of Appeal are: (a) an affidavit that provides general background in circumstances where that information might assist the court in understanding the issues relevant to the judicial review; (b) an affidavit that is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker; and (c) an affidavit that highlights the complete absence of evidence before the administrative decision-maker when it made a particular finding.

[11] The Respondent attempted to portray Mr. Irving’s affidavit as general background information that may assist the Court. However, the Respondent relied on CSC policy documents included as exhibits to the affidavit to argue that vitamin and mineral supplements such as OcuVite are explicitly excluded from CSC’s Formulary. The Respondent therefore took the position that OcuVite could not be provided to inmates free of charge, even when prescribed by a physician.

[12] The Respondent's reliance on Mr. Irving's affidavit goes well beyond the provision of background information, and offers a further basis upon which the decision of the Senior Deputy Commissioner might be upheld. The Senior Deputy Commissioner based her decision on two fundamental considerations: (a) OcuVite is a vitamin and mineral supplement that alleviates, but does not cure, AMD; and (b) OcuVite is an OTC medication that is not covered by most publicly-funded federal, provincial or territorial drug plans. The Respondent cannot "bootstrap" the decision of the Senior Deputy Commissioner with an analysis that does not appear in her decision (*Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at para 64). Mr. Irving's affidavit is not admissible for this purpose.

B. *Is the decision of the Senior Deputy Commissioner to deny Mr. Newton's grievance reasonable?*

[13] The Senior Deputy Commissioner's decision is subject to review by this Court against the standard of reasonableness (*Shortreed v Warkworth Institution*, 2013 FC 304 at paras 21-22; *Yu v Canada (Attorney General)*, 2012 FC 970 at para 15; *Kim v. Canada (Attorney General)*, 2012 FC 870 at para 33). The Court will intervene only if the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[14] Subsection 86(1) of the CCRA provides as follows:

86 (1) The Service shall provide every inmate with
 (a) essential health care; and
 (b) reasonable access to non-essential mental health care that will contribute to the inmate's rehabilitation and successful reintegration into the community.

86 (1) Le Service veille à ce que chaque détenu reçoive les soins de santé essentiels et qu'il ait accès, dans la mesure du possible, aux soins qui peuvent faciliter sa réadaptation et sa réinsertion sociale.

[15] The Senior Deputy Commissioner accepted that Mr. Newton had been diagnosed with AMD, and that he had been prescribed medication by a physician. The Senior Deputy Commissioner found that there are currently no medical treatments available for this condition. She acknowledged that Mr. Newton's optometrist had nevertheless recommended the use of a mineral or vitamin supplement, and that this had been prescribed by the institutional physician.

[16] Mr. Newton argues that eyesight is of such primary importance that the provision of OcuVite free of charge is properly regarded as "essential health care". In addition to s 86(1) of the CCRA, he relies on s 215(1) of the *Criminal Code*, RSC 1985, c C-46 (duty of persons to provide necessities). But Mr. Newton's condition cannot be considered life-threatening. Nor is OcuVite a cure.

[17] The Senior Deputy Commissioner accepted the advice she received from CSC National Headquarters that OcuVite is not covered by CSC because it is an OTC medication that is not covered by most Canadian publicly-funded drug plans. Mr. Newton did not dispute this characterization of the drug.

[18] In my view, it was reasonable for the Senior Deputy Commissioner to accept the advice of CSC National Headquarters that a mineral or vitamin supplement that is not covered by most federal provincial or territorial drug plans is similarly not covered by the CSC drug plan. Mr. Newton did not suggest that CSC inmates should receive a higher level of health care than is available to non-incarcerated Canadians under other publicly-funded drug plans.

[19] This is sufficient to dispose of the application for judicial review. However, I note that the CSC Formulary provides that “[d]rugs which are not openly listed or do not meet all Formulary criteria may be approved in special circumstances. Requests for exceptions will require the Benefits with Criteria and Non-Formulary Medication Request form (CSC-SCC 1415) from the attending physician.”

[20] Mr. Newton’s optometrist described his recommendation to the institutional physician as a “non-formulary request”. Mr. Newton may therefore wish to initiate the formal process for requesting that his prescription be covered by CSC in light of his special circumstances. While the CSC Formulary excludes “[n]on-prescription multivitamin / mineral supplements as routine dietary supplements”, this restriction may not extend to multivitamin or mineral supplements prescribed by a physician for the management of AMD.

VI. Conclusion

[21] The application for judicial review is dismissed. Counsel for the Respondent advised the Court that her client was not seeking costs, and accordingly none are awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed,
without costs to any party.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1521-15

STYLE OF CAUSE: CORY NEWTON v THE ATTORNEY GENERAL OF
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REGIONAL PHARMACY

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: SEPTEMBER 6, 2016

JUDGMENT AND REASONS: FOTHERGILL J.

DATED: SEPTEMBER 8, 2016

APPEARANCES:

Cory Newton FOR THE APPLICANT

Ayesha Laldin FOR THE RESPONDENTS

SOLICITORS OF RECORD:

William F. Pentney, Q.C. FOR THE RESPONDENTS
Deputy Attorney General of Canada
Ottawa, Ontario