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January 18

2013



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Biting 7th Circuit Decision Reverses Denial of Social Security Disability Benefits

This week's post, though dedicated on its face to the recent 7th Circuit decision *Hughes v. Astrue*, is really more of an homage to the often glib and brazen Judge Richard Posner. Just this morning I was reading an article lambasting Judge Posner for what was perceived to be an unnecessarily flippant opinion on a serious matter in authoring the opinion in *Moore v. Madigan* – a case striking down an Illinois law prohibiting the carry of concealed handguns in public by most Illinois citizens. As an attorney in the 7th Circuit and an ardent reader of appellate decisions, I am quite well acquainted with the work of Judge Posner. He is a man that has aptly been described as a “rockstar judge.” Though he is a circuit judge, he has been elevated to a status that makes it newsworthy – at least to us lawyer types – when he finds himself embroiled in an academic feud with Supreme Court Justice Antonin Scalia that is seemingly more worthy for the judges of American Idol than two of the nations preeminent legal scholars.

Nevertheless, I write this as an homage to Judge Posner because of his frankness and heavy handed approach in cases the facts of which demand nothing less. *Hughes v. Astrue* is precisely such a case in which the style of Judge Posner was a welcome voice to an otherwise absurd situation. The case arose from the

denial of social security disability benefits to a 57-year-old woman who had been diagnosed with adhesive capsulitis – better known as a frozen shoulder – and chronic obstructive pulmonary disease (COPD). Physical therapy helped her to manage the capsulitis. However, likely due to a lack of health insurance and low income – ranging between \$4,500 and \$9,000 per year – she was forced to cease treatment. Miss Hughes left her employment as a clerical worker at a hotel as it appeared the hotel was about to close and took up employment in another clerical position. Sadly, due to her inability to lift a box of paper, she was terminated from the position on her first day. She then sought social security disability benefits.

After her testimony on hearing for her application, the administrative law judge (“ALJ”) sent her to an examination by an independent physician. The physician concluded that indeed she suffered from adhesive capsulitis in both shoulders “resulting in range-of-motion problems, and also revealed degenerative rotator cuff disease in both; that she could lift or carry up to 10 pounds, but only occasionally; and that she could not tolerate exposure to pulmonary irritants.” Nevertheless, the ALJ found that Miss Hughes was able to perform the work of her old position and thus was not disabled. Miss Hughes appealed the decision.

Here is where we get the opportunity to see classic Judge Posner in a scathing review of the ALJ’s findings. Judge Posner launches into his critique:

The [ALJ]’s reasoning is hard to fathom. He ignored the finding by Dr. Elmes—whom, remember, he had appointed to examine the applicant, and with whom the applicant had no prior relationship—that she could lift or carry a 10-pound weight occasionally.

Not content to critique the ALJ’s unreasonable and baseless rejection of the medical examiner’s findings, Judge Posner also launched into a searing review of the ALJ’s reasoning with regards to Miss Hughes’ failure to obtain treatment between 2003 and 2007. The ALJ concluded that this failure to obtain treatment was strongly indicative of the fact that she was exaggerating her symptoms. The ALJ even noted Miss Hughes’ lack of insurance and low income. Nevertheless, as Judge Posner fond to be jaw dropping, the ALJ stated that Miss Hughes “could have sought treatment in a hospital emergency room.” Judge Posner was certainly taken aback by this assertion by the ALJ. He stated, “Remarkably, [the ALJ] seemed unaware that emergency rooms charge for their services and are required to treat an indigent only if the indigent is experiencing a medical emergency.”

The Judge continued his criticism of the ALJ by examining his findings in regard to Miss Hughes refusal to take certain medications. At this point you may be inclined to believe that she had rejected these medications due to religious, moral,

or philosophical reasons. Shockingly, such a rational explanation to which the ALJ may have taken offense was not the case. Miss Hughes refused the medications because they gave her headaches. Judge Posner found this dislike for medicine to be “a warranted concern with side effects rather than an irrational antipathy to medical treatment.”

Perhaps the most egregious finding was still yet to come. The ALJ found that Miss Hughes’ respiratory problems could be disregarded on the grounds that she was a smoker and would not be a smoker were her respiratory problems truly serious. To this conclusion, Judge Posner replied, “He must have forgotten that she’d given up smoking 30 years earlier.”

In yet another critique, Judge Posner found that the ALJ inappropriately “attached great weight to [Miss Hughes’] ability to do laundry, take public transportation, and shop for groceries.” As the Judge pointed out, the law is well established that it is naïve for Social Security Administration ALJ’s to equate household chores with the tasks of a job. Citing to another recent 7th Circuit decision – *Bjornson v. Astrue*, the Judge wrote

The critical differences between activities of daily living and activities in a full-time job are that a person has more flexibility in scheduling the former than the latter, can get help from other persons (. . . [her] husband and other family members), and is not held to a minimum standard of performance, as she would be by an employer. The failure to recognize these differences is a recurrent, and deplorable, feature of opinions by administrative law judges in social security disability cases.

Judge Posner went on to point out that the option of purchasing groceries is truly only an option so long as one considers starvation an alternative. Further, providing any weight to the use of public transportation seems to be nonsense, as it “doesn’t involve lifting heavy objects.”

Ultimately, the court was not in a position to say that Miss Hughes was unable to perform her old job or ought to be eligible for social security disability benefits. The role of the court in reviewing the appeal was to critique the decision of the ALJ. Certainly Judge Posner did just that. He provided one of the most blistering critiques that I have ever read. In closing the opinion, Judge Posner added a penultimate paragraph for the ages. He wrote, “Really the Social Security Administration and the Justice Department should have been able to do better than they did in this case.”

Though this was a particularly egregious abuse of discretion by the ALJ, the case provides us an example of the worth of the often-criticized Judge Posner. Certainly he was not writing for himself but wrote on behalf of the 7th Circuit Court of Appeals and to that end it is a bit inappropriate to say that “Judge Posner wrote” because it would be more fitting to state that the “court wrote.” Nevertheless, no other judge would have written such a scathing and brutally honest decision. This is a uniquely Judge Posner decision, and, given the circumstances, it is a welcome frankness from the bench. It is often a breath of fresh air to see outrage from the bench when the actions being critiqued are befitting such outrage. In my opinion, that is where the double-edged sword that is Judge Posner finds his second edge. Certainly, there is much validity in the negative critiques of the man’s storied career. Nevertheless, cases such as *Hughes v. Astrue* show the merit of his style.

Join us again next time for further discussion of developments in the law.

Sources

- *Hughes v. Astrue*, 705 F.3d 276 (7th Cir. 2013).
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