Docket: 2009-1568(IT)I

BETWEEN:

DENNIS R. YOUNG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on December 4, 2009, at Calgary, Alberta

By: The Honourable Justice Campbell J. Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Cynthia Isenor

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2007 taxation year is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to an additional $2,612.90 medical expense for an adjustable bed and an additional $2,673.62 medical expense for travel costs, for a total of $5,286.52.

Signed at Ottawa, Canada, this 16th day of December 2009.

"Campbell J. Miller"

C. Miller J.

Citation: 2009 TCC 628
Date:20091216
Docket: 2009-1568(IT)I

BETWEEN:

DENNIS R. YOUNG,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Miller J.

[1] This is a medical expense case. Mr. Young claimed $13,635.46 in medical expenses that have been disallowed by the Government. The expenses relate to health issues for both Mr. Young (rectal cancer) and Mrs. Young (chronic multiple sclerosis).

[2] Mrs. Young has suffered from multiple sclerosis since 1984. It was clear from Mr. Young's testimony and a letter from Dr. Kilbertus (July 4, 2008) that Mrs. Young requires 24-hour care and that, until he was diagnosed with rectal cancer in March 2008, Mr. Young was able to provide such care and did so in an exemplary manner. It was so very evident in Mr. Young's testimony that his relationship with his wife was a deeply loving, caring, respectful one – as he put it, "we are a team". Mr. Young's diagnosis presented a huge dilemma to the couple as to how Mrs. Young would be cared for during the extensive treatment of Mr. Young's cancer. This situation is summarized in Dr. Kilbertus' letter of July 4, 2008. While I recognize the risk of accepting such correspondence without the ability of the Respondent to cross-examine Dr. Kilbertus on the contents of the letter, I am prepared to accept this medical corroboration of Mr. Young's evidence. It would be simply too much to ask of the Appellant in this informal procedure to call a doctor who is 2500 miles away, to testify. Dr. Kilbertus wrote:

> Mrs. Young has been living with multiple sclerosis for many years and now requires 24 hour care. Mr. Young has been the main care provider for his wife. Due to the high standard of care that he has been able to provide in the home and their ability to work together as a team, Mrs. Young's physical and mental health needs have been met in exemplary fashion. This role entails, among other things, physical strength and agility. It was obvious that Mr. Young would not be able to fulfill his caregiver duties during his peri-operative period and convalescence. Mrs. Young's children, who live in Calgary, were willing and able to provide care for her during their father's convalescence. As purchasing care services for Mrs. Young were beyond the family's means, and care for Mrs. Young is medically necessary, I did not believe that "equivalent medical services were available within the patient's locality". My advice at the time was to consider relocating in Alberta based on Mrs. Young's medical needs.
>
> Mr. Young was diagnosed with a pre-malignant abnormality of his colon following a positive colon cancer screen in November, 2006. He was evaluated extensively in Ottawa by several specialists. It was felt that his lesion was likely malignant based on radiological findings in spite of persistent pre-malignant biopsy results. The surgery that was planned in Ottawa was a more extensive procedure to remove a large mass as pre-operative radiation to shrink its size was not going to be a possibility. Several opinions regarding this were sought. The consequence for Mr. Young was that, following this surgery, it was very likely that he would have a colostomy for the rest of his life. A second opinion was sought in Alberta.
>
> The surgical oncology team in Calgary were willing to entertain the option of pre-operative radiation to shrink the tumor thereby allowing a far greater chance of temporary colostomy. Based on this opinion I did not believe that "equivalent medical services were available within the patient's locality". My advice at the time was to consider relocating in Alberta based on Mr. Young's medical needs.

[3] Mr. Young was aware that his daughter was moving to the Calgary area from Edmonton later in the summer of 2007. Mr. & Mrs. Young travelled first to the Edmonton area in June 2007, where their daughter was then living and shortly thereafter, moved to Airdrie, just outside Calgary, their daughter's new residence. Mr. Young made a few trips to Calgary from Edmonton for treatment, and then many more trips between Airdrie and the Calgary hospital for chemotherapy, radiation etc. between August and December 2007.

[4] With that very brief background, I will address each of the medical expenses in dispute.

[5] <u>Travel expenses</u>

The travel expenses can be broken down into four categories:

i.	cost of travelling from Ottawa to Edmonton between June 13 and June 19, 2007	$3,261.02
ii.	cost of trips to Calgary from Edmonton for treatment between June 25 to July 18, 2007	1,744.64
iii.	cost of travel from Edmonton to the daughter's new residence in Airdrie	1,258.53
iv.	cost of hospital visits between Airdrie and Calgary (36 kms)	1,296.66

[6] Before addressing any specifics of costs incurred, it is first necessary to determine if any of these categories of travel expenses fall within the permitted medical expenses found in subsection 118.2(2) of the *Income Tax Act* (the "*Act*"). Subsection 118.2(2) of the *Act* subparagraphs (*g*) and (*h*) read as follows:

> (2) For the purposes of subsection (1), a medical expense of an individual is an amount paid
>
> (a) …
>
> (g) to a person engaged in the business of providing transportation services, to the extent that the payment is made for the transportation of
>
> (i) the patient, and
>
> (ii) one individual who accompanied the patient, where the patient was, and has been certified by a medical practitioner to be, incapable of travelling without the assistance of an attendant from the locality where the patient dwells to a place, not less than 40 kilometres from that locality, where medical services are normally provided, or from that place to that locality, if
>
> (iii) substantially equivalent medical services are not available in that locality,
>
> (iv) the route travelled by the patient is, having regard to the circumstances, a reasonably direct route, and
>
> (v) the patient travels to that place to obtain medical services for himself or herself and it is reasonable, having regard to the

> circumstances, for the patient to travel to that place to obtain those services;
>
> (h) for reasonable travel expenses (other than expenses described in paragraph (g)) incurred in respect of the patient and, where the patient was, and has been certified by a medical practitioner to be, incapable of travelling without the assistance of an attendant, in respect of one individual who accompanied the patient, to obtain medical services in a place that is not less than 80 kilometres from the locality where the patient dwells if the circumstances described in subparagraphs (g)(iii), (iv) and (v) apply;

[7] There are several conditions to be met for the travel expenses to qualify as medical expenses:

i. substantially equivalent medical services are not available in the locality where the patient dwells;

ii. the route is reasonably direct;

iii. it is reasonable to travel to the place to obtain the medical services; and

iv. the locality of the medical services is greater than 80 kilometers from where the patient lives.

The fourth condition applies to disallow any travel expenses from Airdrie to Calgary as it is a distance of considerably less than 80 kilometers.

[8] With respect to the move from Edmonton to Airdrie, this was not a travel expense related to getting closer to the required medical service. This is plainly and simply a move by the Youngs' daughter from Edmonton to the Calgary region. They needed to stay with their daughter so she could provide care to Mrs. Young, not to get Mr. Young closer to Calgary. That was simply a serendipitous result. He was already getting the medical services in Calgary; the move could not be said to have been made so that he could get those services. There is no doubt, had the Youngs' daughter not moved, the Youngs' would have remained with her in Edmonton. The conditions for the travel expense from Edmonton to Airdie have therefore not been met.

[9] With respect to the expense related to the several trips by Mr. Young between Edmonton and Calgary, before the shift to Airdrie, the Youngs must satisfy me that

substantially equivalent medical services were not available in Edmonton. There is simply no evidence in this regard. And for good reason. The Youngs knew that Mr. Young would be treated in Calgary, the locality to which his daughter was moving. It would make little sense to establish the longer term treatment in Edmonton. Mr. Young therefore did not look into this option. But it leaves me with little evidence of whether equivalent medical services were available in Edmonton. Mr. Young's summary of his travel expense details his Edmonton-Calgary trips as being for "biopsies, emergency hospital care, CT scan, Dr. Buie, colonoscopy, rectal ultrasound, MRI, meeting with medical oncologist Dr. Doll". Without any greater detail, apart from the specific doctors, these do not seem to be the types of medical interventions that could not have been handled in Edmonton. I note that the required surgery did not take place until October, after Mr. Young's move down to Airdrie. Mr. Young's circumstances are specific and are driven by the need for his family to care for his wife. It may seem inequitable to Mr. Young that as a result of such circumstances, he has been unable to satisfy one of the conditions for these travel expenses for the several Edmonton-Calgary trips. Yet the provisions of subsection 118.2(2) are clear: the travel expenses are to accommodate those who cannot access medical services where they dwell. They are not to accommodate personal needs or preferences due to family circumstances, as harsh as that may seem.

[10] With respect to the major expense of the trip from Ottawa to Alberta, this is more problematic. Was this a question of simply meeting personal needs or preferences, being the care provider for Mrs. Young, or was it because Mr. Young could not access substantially equivalent medical services in Ottawa. It is important to keep in mind that in applying paragraph 118.2(2)(h), that the patient in question is Mr. Young, not Mrs. Young. Mrs. Young did not travel to Alberta to obtain "medical services" she could not obtain in Ottawa. She travelled to Alberta to obtain care and support from her family, while Mr. Young underwent his cancer treatment. I have no doubt such care and support was essential, and indeed of greater import than "medical services", but I cannot stretch "medical services" to embody the care and support of a family, notwithstanding Dr. Kilbertus' view such care was "medical services". All to say, I address the application of paragraph 118.2(2)(h) on the basis that Mr. Young was the patient.

[11] So, which came first, Mr. Young's inability to access the appropriate medical services in Ottawa, or the Youngs' need to travel to Alberta so Mrs. Young could be cared for by family, while Mr. Young underwent treatment. Clearly, if Mr. Young stayed in Ottawa there would be two significant impacts: one, he would have undergone more drastic cancer treatment that he was able to avoid by being treated in Calgary; and two, his wife could not have been properly cared for by him alone. The

evidence was not as detailed as it might have been on this point. For understandable reasons, already alluded to, none of the Ottawa physicians gave evidence. Mr. Young, however, provides insight in his letter of April 18 to the Canada Revenue Agency where he states:

> As there was no one to care for Hazel locally and no way we could afford to put Hazel in a nursing home in Ottawa while I was being treated for cancer, we had no option but to move out of our apartment in Ottawa, put our furniture in storage and drive to Alberta where our daughter, Jennifer, could look after Hazel while I was receiving the five weeks of chemotherapy, 28 radiation treatments, surgery followed by six days in hospital and six more weeks recovering from surgery before I could lift Hazel again and seven more weeks of chemotherapy following surgery. My surgeon in Ottawa recommended to Dr. Donald Buie, a surgeon friend of his in Calgary, to remove my tumor.

Yet, Dr. Kilbertus, in her letter of July 4 explains the difference in the medical advice between Ottawa and Calgary in the last paragraph quoted in paragraph 2 of this Judgment. I do, therefore, have some evidence, albeit not subjected to any cross-examination, suggesting that Calgary did offer medical services that were not being offered in Ottawa. Taking a liberal and compassionate approach to the application of these medical expense provisions, I do find that the travel to Alberta satisfies all the conditions. It was, in Mr. Young's very specific circumstances, reasonable to travel to Alberta to obtain the cancer treatment that was not being offered in Ottawa.

[12] Turning then to the specific expenses making up the $3,269.02 claimed, Mr. Young seeks $585.74 for hotels, (for which he has provided receipts), kilometer allowance of 47.9¢/kilometer, for a total of $1,781.88, and a meal allowance for two totaling $901.40. I accept the hotel costs. The meal expense was based on allowances Mr. Young advised were provided to Members of Parliament. Revenue Canada in their Interpretation Bulletin 519R2 suggests $51/day for meals. As the meals will only pertain to Mr. Young, I calculate he is entitled to six days at $51/day or $306. The vehicle expense, based on 47.9¢/kilometer rate is a close reflection of allowances set forth in the CRA's Interpretation Bulletin dealing with travel costs. I find it is reasonable and allow it in full.

[13] Adjustable bed

Mr. Young did incur $2,612.90 for an adjustable bed from Sleep Country for his wife's use at his daughter's house. Mr. Young acknowledged it was not a hospital bed as such, but it had features more advantageous to his wife than a hospital bed. In fact, the hospital bed, with its side attachments, would not be appropriate for Mrs.

Young who had to be lifted in and out of bed. Dr. Goyal, Mrs. Young's Calgary doctor, indicated in a letter to Revenue Canada:

> The bed that Sleep Country offers has simple features that helped Mrs. Young be more comfortable and independent. The presence of a remote for independent maneuvering of the bed and a vibrating system have both improved her quality of life immensely and these features are not available in a hospital bed. At her advanced stage of multiple sclerosis, any small comfort that can be provided to her, improved her quality of life.

[14] Regulation 5700(h) of the *Income Tax Regulations* (the "*Regulations"*) refers specifically to a "hospital bed". Justice Bowie dealt with a similar matter of a patient with multiple sclerosis requiring an adjustable bed in the case of *Crockart v. R.*[1] and found it was inappropriate to too narrowly construe the term "hospital bed":

> I do not believe that it was the intention of either Parliament, when enacting subsection 118(2), or the Governor in Council, when enacting *Regulation* 5700, to so limit the availability of the credit as to deny it to Mr. Crockart because he bought a bed having the desirable attributes of a "classic hospital bed", but one more beneficial to his wife than such a "classic hospital bed" would be.

I agree with Justice Bowie and find the bed, medically suited to Mrs. Young's health requirements, falls within the spirit of the legislated "hospital bed". The Respondent argues that the bed was not prescribed by Mrs. Young's physician. This is not, however, a requirement for qualification. I allow the cost of $2,612.90.

[15] Pedestal sink

The Youngs paid $400.00 for the installation of a pedestal sink in their daughter's home in Airdrie to enable easier access for Mrs. Young to a sink. If this expense is allowable as a medical expense, it must be pursuant to paragraph 118.2(2)(*l*.2).

> (l.2) for reasonable expenses relating to renovations or alterations to a dwelling of the patient who lacks normal physical development or has a severe and prolonged mobility impairment, to enable the patient to gain access to, or to be mobile or functional within, the dwelling, provided that such expenses
>
> ...

---

[1] 1999 CarswellNat 188.

This is a two-pronged test: it is the second prong which is a problem for the Youngs. The sink expense must be of a type not normally incurred by those with normal physical development. This was not any specially designed sink but simply a pedestal sink that could be found in any ordinary home. The second branch of the test has not been met.

[16] Intercom, head packs, postage, photocopying, walkie-talkies, oral syringe

The Appellant was unable to refer me to any provision in subsection 188.2(2) that would capture these items. They may well have been medically necessary, but unfortunately for Mr. Young, that is not the test. If items are not specifically covered by the legislation, there is no catch-all provision to allow them as medical expenses on the basis they are simply medically necessary. These items are disallowed.

[17] Parking and taxis

These expenses were incurred while the Youngs were dwelling with their daughter and are not connected to the travel from Ottawa to Alberta, which is the only travel expense I have allowed. Travel to the hospital while in Edmonton and Airdrie have not been allowed and consequently, parking and taxis in connection with that travel cannot be allowed.

[18] Herbs, vitamins and non-prescribed medicines

The law has been made quite clear in recent decisions such as *Ali v. R.*[2] and *Tall v. R.*[3], which reinforce earlier comments of the Federal Court of Appeal in *Ray v. R.*[4]. For medicines to be claimed as medical expenses pursuant to paragraph 118.2(2)(*n*), the medicines must have been prescribed by a medical practitioner and recorded by a pharmacist. The Appellant argues that many of the medicines could have been prescribed, but it was more cost effective to get them over-the-counter. This does not

---

2 2008 CarswellNat 1629.

3 2009 FCA 342.

4 2004 FCA 1.

overcome the requirement for a prescription, nor does it answer the need for the medicines to be recorded by a pharmacist. The law was amended in 2008 to make it clear that only those medicines qualified that can lawfully be acquired for use if prescribed by a medical practitioner. This, I suggest, reflects the state of the law in 2007 as established by caselaw. These expenses, therefore, do not qualify.

[19] Reading glasses

For reading glasses to qualify they must, in accordance with paragraph 118.2(2)(*j*) be prescribed by a medical practitioner or optometrist. I had no evidence of any prescription and these expenses are denied.

[20] In summary, the Appellant's appeal is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is entitled to an additional $2,612.90 medical expense for the bed and an additional $2,673.62 medical expense for travel, for a total of $5,286.52.

Signed at Ottawa, Canada, this 16th day of December 2009.

"Campbell J. Miller"

C. Miller J.

CITATION:	2009 TCC 628
COURT FILE NO.:	2009-1568(IT)I
STYLE OF CAUSE:	DENNIS R. YOUNG AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	December 4, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Campbell J. Miller
DATE OF JUDGMENT:	December 16, 2009

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Cynthia Isenor

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada