Citation: *R. C. v. Minister of Employment and Social Development*, 2014 SSTAD 124

Appeal #: CP28018

BETWEEN:

R. C.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Rescind or Amend Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

TYPE OF HEARING: On the Record

DATE OF DECISION: May 29, 2014

DECISION

[1] The Social Security Tribunal, (the "Tribunal"), refuses to rescind or amend the decision of the Pension Appeals Board, (the "PAB"), dismissing the Applicant's appeal of the decision of a Review Tribunal that denied his application for a disability benefit pursuant to ss. 42(2) of the *Canada Pension Plan,* ("CPP").[1]

INTRODUCTION

[2] On April 21, 2011, a Review Tribunal determined that a CPP disability pension was not payable to the Applicant. He filed an appeal with the PAB. On November 28, 2012, the PAB denied the appeal.

[3] On November 25, 2013, in accordance with paragraph 66(1)(b) of the *Department of Employment and Social Development* (DESD) *Act*, the Applicant filed an Application to rescind or amend the decision of the PAB ("the Application").

ISSUE

[4] Does the new information provided by the Applicant constitute "new material facts" as that term is defined in the statute?

THE LAW

[5] The applicable statutory provision is found in s. 66 of the DESD Act, which is framed as follows,

> **66.** Amendment of Decision **- (1)** The Tribunal may rescind or amend a decision given by it in respect of any particular application if
>
> a. In the case of a decision relating to the *Employment Insurance Act*, new facts are presented to the Tribunal or the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact; or
>
> b. In any other case, a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[1] R.S.C. 1985, c. C-8, as amended

GROUNDS OF THE APPLICATION

[6] The Applicant bases his Application on three grounds. The principal ground is that the Tribunal failed to consider a letter from his family doctor, Dr. McCarthy, in which she concludes that his disability was both prolonged and severe.

[7] The grounds are found under the rubric found at Box B of the Application Form, namely, "REASON(S) FOR APPLICATION" and the general statement, " Based on grounds in s.66(1)(a) and s. 66(1)(B) of the *Department of Human Resources and Skills Development Act* I am applying to rescind or amend the SST decision of new facts because":

> A letter from my doctor explaining that therefore, I can state with confidence that Mr. R. C.'s disability is prolonged. The other aspect of disability is the severity of the patient's symptoms. "Mr. R. C. has had severe chest and back pain which prevents him from doing many daily duties as well as any gainful employment."
>
> This letter is completely missed in the Board's decision. And could prove to be very serious to the Applicant. It also meets exactly the Board's criteria for prolonged and severe. And would also be considered restrictions as well. Which the Board said "there have been no restrictions put on Mr. R. C." when there was by two doctors.
>
> Appointment letter from Dr. Tarhoni Physical Medicine and Rehabilitation. Note the dates. The letter is dated October 3, 2012; my hearing date is August 1, 2012. My appointment with Dr. Tarhoni is November 18, 2013. I received my decision November 28th 2012. One year later. He is recommending test and treatments to my doctor. And when I receive this information and his report, I will send it right in to the Tribunal. ASAP. Dr. Alan long Psychiatrist. (***Typed as per original***)

[8] Subsequently, the Applicant provided the Tribunal with a copy of a physiotherapy report dated May 6, 2014. The report indicates that the Applicant began physiotherapy on February 19, 2014.

[9] The Respondent was given the opportunity to make submissions concerning the Application. The Respondent's initial position was that the Application did not comply with s. 46 (c) of the *Social Security Tribunal Regulations.* It was the Respondent's contention that the Applicant had not identified what new facts exist, how they meet the test for new facts, nor had he set out in what way they established that he was disabled when he last qualified for benefits.

On being afforded a further opportunity to respond to the Application, there was no response. Therefore, the Tribunal proceeded to render its decision.

a) Preliminary Matters

[10] Two preliminary issues arise in respect of the Application to rescind or amend the PAB's decision.

[11] The first question relates to the timing of the Application, namely, whether it was brought within the time frame required by ss. 66(2) of the DHRSD Act (i.e. within one year after the day on which the decision is communicated to the Applicant). Without deciding the question of what is meant by "within one year after the day on which the decision is communicated," the Tribunal finds that the present Application falls within the one year time limit set out in ss. 66 (2) of the DHRSD Act.

[12] The PAB issued its decision on November 28, 2012 and the Applicant filed his application on November 25, 2013. Thus the Application was brought within the one-year time limit provided for by the legislation.

[13] Second, the Tribunal was required to consider whether the "Deeming" provisions applied to the Application. The Tribunal concluded that they do. S. 269(2) of the *Jobs, Growth and Long-term Prosperity Act* [2] provides that, an application made under s. 66 of the *DHRSD Act* after March 31, 2013 is deemed to relate to a decision made, as the case may be, by

a) the General Division of the Social Security Tribunal. In the case of a decision made by a board of referees; or

b) the Appeal Division of the Social Security Tribunal, in the case of a decision made by an umpire.

[14] The Applicant made his application on November 25, 2013; which post-dates the March 31 requirement. The Application is, therefore, deemed to have been made to the Appeal Division of the Tribunal.

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[2] *Jobs, Growth and Long-term Prosperity Act* [2]

ANALYSIS

[15] While the current legislative provision provides for the extra-ordinary step of reconsidering a final decision based upon new facts, the prior legislative provisions also provided for the reconsideration of a decision on the basis of new facts. Ss. 84(2) of *Canada Pension Plan* provided:

> 84. (2) The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.

[16] The Federal Court of Appeal has interpreted subsection 84(2) in several of its decisions.[3] The Court has very clearly enunciated a two-part test for evidence to be admissible as a "new fact". The evidence must:

a) … establish a fact that existed at the time of the original hearing but was not discoverable before the original hearing by the exercise of due diligence; and

b) the evidence must reasonably be expected to affect the result of the prior hearing.

[17] This two-part test developed by the Federal Court of Appeal is now reproduced in s. 66 of the DHRSD Act when it refers to "new material fact" discoverable through the exercise of "reasonable diligence". Therefore, the Tribunal must determine if the proposed new evidence submitted with the Application meets the "new material facts" test with regards to a determination of the Applicant's alleged disability as of the Minimum Qualifying Period (MQP) date.

[18] The Applicant's primary concern is that the PAB ignored medical evidence in the form of a letter that he said was decidedly in his favour. He contends that, properly considered, this letter, dated November 3, 2010, ought to have persuaded the PAB to find that he was disabled within the meaning of the *CPP*.

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[3] *Canada (Attorney General) v. MacRae, [2008] F.C.J. No. 393, at paragraph 16; see also Kent v. Canada (Attorney General), [2004] F.C.J. No. 2083, at paragraphs 33-35; Canada (Minister of Human Resources Development) v. Macdonald, [2002] F.C.J. No. 197, at paragraph 2; Mazzotta v. Canada (Attorney General), [2007] F.C.J. No. 1209, at paragraph 45). Higgins v. Canada (Attorney General)*, 2009 FCA 322, at paragraph 8.

[19] An examination of the PAB decision confirms the letter is neither mentioned nor included in the section of the decision that is headed Medical Evidence. However, Dr. McCarthy's letter of September 21, 2009 is not only included in this section; the Board expressly cites her conclusion in that letter, namely, "I think it highly unlikely that he will recover to the extent of being able to work in any capacity." (para. 16)

[20] The PAB in its decision (paras 6-20) sets out in some detail the medical practitioners with whom the Applicant consulted; their diagnoses and their recommendations for treatment. The PAB also referred to Dr. McCarthy's notes from December 2007 to July 15, 2009 (para. 10) and at para. 19, the medical report dated March 9, 2009 that accompanied the Applicant's application for CPP disability benefits. The only omission is the November 2010 letter, the body of which is reproduced below.

> "I am providing medical information on your client and my patient, R. C., at your request and with his consent.
>
> I am a graduate of Memorial Medical School in 1990, and obtained certification by The College of Family Physicians of Canada in 1992. I have been practicing in Newfoundland since this date and Mr. R. C. has been my patient since 2000.
>
> As you are aware, Mr. R. C. has applied for CPP disability benefits and long term disability from Manulife Financial. I understand you are writing for clarification regarding a report sent to Service Canada on September 21, 2009.
>
> At this time, I indicated that I thought it was highly unlikely that Mr. R. C. would recover to the extent of being able to work in any capacity. Certainly, Mr. R. C.'s symptoms have been of a long-term nature. I did state that he may potentially have some stabilization of his symptoms if he was able to obtain further treatment, for example, physiotherapy or active release therapy or acupuncture. Mr. R. C. has been unsuccessful in obtaining these treatments through Worker's Health and Safety as well as other avenues. Given the length of time that has elapsed since the beginning of his symptoms, he would be an unlikely candidate for full recovery. Therefore, I can say with confidence that Mr. R. C.'s disability is prolonged.
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> The other aspect of disability is the severity of the patient's symptoms. Mr. R. C. has had severe chest and back pain which prevents him from doing many daily duties as well as any gainful employment. His work related and environmental sensitivities and allergies are severe and prevent him from returning to his previous employment in any capacity.
>
> I trust that this information is satisfactory. If you require further information, please contact my office."

[21] It is clear that Dr. McCarthy's purpose in providing this 2010 letter is to respond to a request from the Applicant's counsel asking for clarification of the earlier (2009) letter. In the following statements, Dr. McCarthy make reference is made to her September 2009 letter:

> I am providing medical information on your client and my patient, R. C., at your request and with his consent. (and later) …I understand you are writing for clarification regarding a report sent to Service Canada on September 21, 2009.

[22] As the PAB never referred to this letter in its decision, the question therefore becomes, is this letter and the absence of a reference to it a "new fact' that could not have been discovered at the time of the hearing with the exercise of reasonable diligence?

[23] As stated earlier, the case law has addressed the question of what constitutes a "new fact". In *Richard*[4] the Federal Court of Appeal set out the applicable test on an application to rescind or amend a decision. The Federal Court of Appeal stated that a new fact is a fact that establishes that a condition was in existence at the time of the original hearing but could not have been discovered with the exercise of reasonable diligence. In *MacRae,* para. 16, besides establishing a two-part test for evidence to be admissible as a "new fact", the Federal Court also clarified that the "new fact" usually relates to a medical condition,

a) the evidence must establish a fact (usually a medical condition in the context of the Canada Pension Plan) that existed at the time of the original hearing but was not discoverable before the original hearing by the exercise of due diligence ("the discoverability test"), and

b) the evidence must reasonably be expected to affect the result of the prior hearing ("the materiality test").[5]

[24] Where a medical report reiterates what is already known or has been diagnosed [and in the Tribunal's respectful view, concluded] the reports will not be considered as evidencing "new facts"[6]. The case law does not appear to either address or treat a Tribunal's omission as a new fact.

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[4] *Canada (Minister of Human Resources Development) v. Richard, FCA 2004 37.*
[5] *Canada (Attorney General) v. MacRae,* [2008] F.C.J. No. 393.
[6] *Taylor v. Canada (Minister of Human resources Development),* 2005 FCA 293, [2005] F.C.J. No. 1532.

[25] In this case, the "omitted" medical report merely reiterates what is already known or had previously been diagnosed, albeit in somewhat stronger terms than in the original report. In this sense, the report adds little to the body of evidence that was before the Tribunal. A significant difference between the two letters is that in the 2009 letter, Dr. McCarthy reaches the conclusion that the Applicant can do no work, while in the 2010 letter, she appears to limit her conclusion to his former employment. She writes, "His work related and environmental sensitivities and allergies are severe and prevent him from returning to his previous employment in any capacity." (emphasis mine)

[26] The Applicant has asked the Tribunal to find that the PAB's apparent failure to consider Dr. McCarthy's letter of November 2010 is a "new fact" that meets all of the criteria for the consideration in respect of an application under s. 66(2) of the DHRSD Act. Relying on *Taylor*, the Tribunal is unable so to find. In the Tribunal's view, the omission cannot constitute a new fact in the context of the section.

[27] The omission, if it is an omission, may be a reviewable error that is properly raised at the level of the Federal Court of Appeal. Case law establishes that a Tribunal is not required to address every piece of evidence before it, and in this case, the letter that was allegedly omitted from the PAB's consideration was a letter addressed to the Applicant's counsel in response to that counsel's request for clarification of the Opinion letter that was submitted in September 2009. Other than the differences between her conclusions that were referred to earlier, the opinion that Dr. McCarthy expresses in the 2010 letter ultimately repeats the opinion she expressed in 2009. The letter, having been before the PAB at the date of the hearing cannot be considered to be a "new fact" that existed at the time of the hearing but which he could not have discovered at that time with the exercise of reasonable diligence. The Application fails on this ground.

The appointment with Medical Practitioners, Dr. Tarhoni and Dr. Long

[28] The Applicant has submitted, as an additional new fact, a letter indicating that he has an appointment with a Dr. Tarhoni, a specialist in Physical Medicine and Rehabilitation. The letter, which is dated October 3, 2012, indicates that the Applicant has been granted an

appointment with Dr. Tarhoni for November 18, 2013. Both the letter and the appointment post-date the hearing. The Applicant did not submit the results of this appointment. Thus, as it stands, the appointment letter can establish nothing, least of all that the Applicant was disabled within the meaning of the CPP as of December 31, 2011.

[29] In the Tribunal's view, without more, the mere fact of an appointment alone is insufficient to meet the discoverability test set out in *Taylor,* as it is insufficient to establish any "new fact" as the term is defined in the context of the CPP.

[30] Similarly, the Tribunal reaches the same conclusion with respect to the pending appointment with the Psychiatrist, Dr. Alan Long.

[31] In the context of the present case, a "new material fact" is a fact that existed at the time of the hearing of the Applicant's appeal to the Pension Appeals Board but that could not have been discovered at that time by the Applicant with the exercise of reasonable diligence, and it must also be a fact that could reasonably be expected to establish his disability, as of December 31, 2011, the end date of his MQP period. The Applicant contends that the failure of the Pension Appeals Board to include Dr. McCarthy's letter of November10, 2010 is a new fact. The Tribunal finds that it is not. The letter existed prior to the hearing and was, in fact, before the PAB at the hearing. That the Tribunal did not refer to it may be an omission that may ground an application for judicial review of the decision, but that, in the Tribunal's view does not ground an application to rescind or amend the decision.

[32] The Applicant also contends that his post-hearing appointments with Dr. Tarhoni and Dr. Long are new facts within the meaning of s. 66 of the DHRSD Act. The Tribunal has concluded that the letters of appointment do not meet either prong of the new facts test as they reveal no new medical evidence that could establish a fact that existed at the time of the original hearing but was not discoverable before the original hearing by the exercise of due diligence or is evidence that could reasonably be expected to affect the result of the prior hearing. Accordingly, on this ground, the Application also fails.

c) The Physiotherapy Report

[33] After he filed the Application, the Applicant sent the Tribunal a copy of a physiotherapy report. The Tribunal received this document on May 7, 2014. It decided to consider the document in rendering its decision because it appeared to have come directly from the Applicant and because it was not clear whether or not he was acting on his own behalf.

[34] The physiotherapy report is written by Tony Ingram, a clinical physiotherapist with the Eastern Health Sciences Centre in St. John's. The report states that the despite undergoing a course of physiotherapy to treat myofascial pain syndrome, the Applicant has not seen any improvement in his condition. The report sets out the treatment regime that the physiotherapist prescribed for the Applicant. It also contains the physiotherapist's conclusion that it was unlikely that in 2014, the repetitive strain injuries that the Applicant experienced at his former job were continuing. The report also notes that at the time of writing the Applicant demonstrated normal range of motion and strength of his affected muscles. Overall, the Tribunal finds that the physiotherapy report does not support the Application as it does not provide any new facts as defined in the statute and what facts it does disclose do not support a finding of severe disability on or before the MQP.

CONCLUSION

[35] The Application to rescind or amend the decision of the PAB is refused.

Hazelyn Ross
Member, Appeal Division