Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *J. M. v. Minister of Employment and Social Development,* 2016 SSTGDIS 23

Tribunal File Number: GP-15-2419

BETWEEN:

J. M.

Applicant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Raymond Raphael

HEARD ON: March 3, 2016

DATE OF DECISION: March 9, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

J. M.: Applicant

R. D.: Applicant's wife

A. D.: volunteer

C. B.: friend

Jean-Marc Doiron: news reporter for L'Acadie Nouvelle

INTRODUCTION

[1] The Applicant's application for a Canada Pension Plan (CPP) disability pension was date stamped by the Respondent on January 15, 2013. The Respondent denied the application initially and upon reconsideration. The Applicant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT) and the appeal was transferred to the Social Security Tribunal (Tribunal) in April 2013.

[2] The Applicant started to receive retirement benefits in October 2012 and he did not cancel his retirement benefits with six months. Pursuant to s. 66.1(1) of the CPP the Tribunal had to determine whether the Applicant had a severe and prolonged disability on or before September 30, 2012 (the month before his retirement pension first became payable).

[3] On March 18, 2015 in an On the Record hearing, a Member of the General Division-Income Security Section of the Tribunal determined that the Applicant was not disabled within the meaning of the CPP on or before September 30, 2012. The Applicant did not seek leave to appeal to the Appeal Division of the Tribunal.

[4] On July 3, 2015 the Applicant applied pursuant to s. subsection 66(1)(b) of the *Department of Employment and Social Development Act* (DESD Act) to have the March 18,

2015 Tribunal decision rescinded or amended on the basis of “errors by the department and the Tribunal. As well as new information that should be considered.”

[5] The hearing of this application was by Teleconference for the following reasons:

a) The Applicant will be the only party attending the hearing;

b) There are gaps in the information in the file and/or a need for clarification; and

c) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

New Facts

[6] The new facts relied upon consist of the following reports:

1. A report from Dr. Moustafa Adams dated February 12, 2015.
2. A report from Dr. Seemann dated September 13, 2012.
3. A pre-op physician history and physical report prepared by Dr. Moustafa Adams (date not indicated).
4. CT reports from the University Hospital of Alberta dated September 14, 2012.
5. An operative report from Dr. Seemann dated September 14, 2012.
6. A physician admit advice dated September 14, 2012, and
7. A physician history and surgery report from Dr. Moustafa Adams dated October 3, 2012.

[7] In a letter dated June 15, 2015 which accompanied the New Facts Application the Applicant stated that he had difficulty acquiring medical information from the physicians he had seen in Alberta; that he submitted the documents in March 2015; and that they were not accepted because they were submitted outside the filing period of January 2, 2015. He

submitted that the medical reports prove that he was being treated for squamous carcinoma in August 2012; that in September he received a laryngeal and right tonsillar squamous cell carcinoma diagnosis; and that to exclude the reports is unjust and places an unfair burden on his case.

[8] The new facts reports were faxed to the Tribunal on March 23, 2015 which was after the decision had been made. On March 27, 2015 the Tribunal determined that the documents will not be accepted because they were submitted outside of the filing period of January 2, 2015 and the decision has already been rendered.

THE LAW

[9] Paragraph 44(1) (b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

a) be under 65 years of age;

b) not be in receipt of the CPP retirement pension;

c) be disabled; and

d) have made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[10] Subsection 66(1)(b) of the DESD Act provides that in cases other than a decision relating to the *Employment Insurance Act* the Tribunal may rescind or amend a decision given by it if a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[11] Subsection 66(1)(b) reproduces the two-part test developed by the Federal Court of Appeal when interpreting subsection 84(2) of the CPP as it read immediately before April 1, 2013 when s. 66 was introduced. The Federal Court of Appeal in *Canada (Attorney General) v. MacRae* enunciated a two-part test for evidence to be admissible as a “new fact” under former subsection 84(2) as follows:

a) It must establish a fact (usually a medical condition in the context of the CPP) 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 results of the prior hearing (the "materiality test").

[12] This two-part test developed by the Federal Court of Appeal is reproduced in section 66 of the DESD Act, formerly the *Department of Human Resources Skills Development Act*, when it refers to "new material fact" discoverable through the exercise of "reasonable diligence:" *S.M. v Minister of Human Resources Development*, 2014 SSTAD 214.

ISSUE

[13] Does the evidence filed in support of the New Facts Application establish "new facts" within the meaning of subsection 66(1)(b) of the DESD Act?

[14] If the Tribunal finds that there are new facts with meaning of subsection 66(1)(b) of the DESD Act, does the evidence support a determination that the Applicant's disability was severe and prolonged with the meaning of the CPP as of September 30, 2012 and continuously so thereafter?

The General Division Decision

[15] On December 3, 2014, in accordance with the Tribunal practice at that time, the Tribunal sent a Notice of Hearing to the parties indicating that the Tribunal Member having reviewed all documents filed by the parties intends to make a decision on the basis of the documents and submissions filed, for the following reasons:

- The issues under appeal are not complex;
- There are no gaps in the information in the file or need for clarification; and

- The form of hearing respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[16] The Notice set a filing period for additional documents of January 2, 2015 and a response period of February 2, 2015. The Notice also indicated:

> **DOCUMENTS FILED AFTER THE RESPONSE PERIOD**
>
> The Tribunal Member will issue a decision to either allow or dismiss the appeal after the end of the Response Period, or possibly sooner if no documents or submissions are filed during the Filing Period. Accordingly, any documents not filed within the appropriate timelines indicated, may not be considered by the Tribunal Member in making the decision. If documents are filed late, but before a decision is issued, they will be considered only at the Tribunal Member's discretion.
>
> **NEXT STEPS**
>
> *While the current intention of the Tribunal Member is to make a decision on the basis of the documents and submissions filed, the Member may decide that a hearing is needed for this appeal depending on what, if any, additional information is received during the Filing and Response periods* [Emphasis added]. If this is the case, all parties will then receive a Notice of Hearing with further instructions. Following the Response Period, or possibly sooner if no documents or submissions are filed during the Filing Period, the Tribunal will notify all parties of the outcome or the next steps in this appeal.

[17] Although the Applicant did not file any additional documents, on January 22 the Respondent filed submissions dated January 20, 2015 (outside the filing period of January 2, 2015).

[18] In its submissions the Respondent took the position that the Applicant has not established a severe and prolonged disability within the meaning of the CPP on or prior to September 30, 2012. The Respondent referred to the Applicant’s disability questionnaire in which he indicated that he could no longer work due to his medical condition as of October 27, 2012 and to a Service Canada telephone conversation with the Applicant’s supervisor at his last employment who confirmed that the Applicant was employed from July 7, 2012 to October 27, 2012, that his work was satisfactory, and that he required no help to accomplish his duties.

[19] The Respondent recognized that the Applicant's condition had not allowed him to return to work since October 2012, but submitted that in order to be eligible for disability benefits the Applicant must be found to have a severe and prolonged disability on or prior to September 30, 2012. With respect to format of hearing, the Minister took the position that the appeal can proceed in writing based on the current record, and reserved the right to participate in an oral hearing if the Tribunal determined that the appeal will be heard orally.

[20] The Respondent's submissions were sent to the Appellant on January 23, 2015.

[21] The Applicant's appeal was dismissed by an On the Record determination on March 18, 2015.

[22] In the initial decision the Tribunal Member reviewed the questionnaire and medical reports in the hearing file which included a report from Dr. Hart dated December 5, 2012, a Disability Claim Form completed by the Applicant and Dr. Hart on December 6, 2012, a report from Dr. Hart dated February 11, 2014, and a report from Dr. Allain, the Applicant's family doctor, dated November 12, 2014. The initial Tribunal Member did not have any reports from the doctors who treated the Applicant in Alberta during August and September 2012.

[23] The analysis and conclusion stated as follows:

> The Appellant must prove on a balance of probabilities that he had a severe and prolonged disability on or before September 30, 2012, the month before he began receiving his early retirement pension benefits.
>
> *It is clear that the Appellant is currently unable to work* [Emphasis added]. However, the evidence does not demonstrate that the Appellant had a severe and prolonged disability on or before September 30, 2012. His symptoms began in May 2012, and he continued working until October 26, 2012. Dr. Hart's Medical Report from December 6, 2012 indicated that he only began treating the Appellant in November 2012, and that his prognosis was dependent on how the Appellant responded to treatment. Unfortunately, the Appellant ultimately required a total laryngectomy, pec flap, reconstruction and tracheoesophageal puncture placement; however these procedures did not occur until December 2013. The Tribunal finds that the Appellant did not have a severe and prolonged disability on or before September 30, 2012, the month before he began receiving early retirement pension benefits…
>
> The appeal is dismissed.

The New Facts

[24] The report dated February 12, 2015 from Dr. Moustafa Adams indicated that he saw the Applicant on three visits: August 5, 2012, September 9, 2012, and October 3, 2012. He reported that the Appellant had difficulty swallowing and a chronic hoarse voice. He referred the Applicant to Dr. Seemann, an ENT specialist, who did an endoscopy that was suspicious for squamous carcinoma, and then performed a quadroscopy, biopsy of the larynx, and right tonsillectomy on September 4, 2012. The post-operative diagnosis was laryngeal and right tonsillar squamous cell carcinoma.

[25] Dr. Seemann's September 13, 2012 report indicated that he saw the Applicant regarding dysphagia, throat pain, and a hoarse voice. The Applicant stated that he had noticed some pain in the throat starting in about May 2012; that his voice quality had been getting worse; that he has been having increased dysphagia over the last month or so; that he has been losing some weight over the last couple of months; that he is finding solid foods harder to swallow, but is still maintaining swallowing fluids; and that he notes pain in his right ear as well.

[26] The physician history and physical report prepared by Dr. Moustafa Adams indicates the proposed surgery to be a quadroscopy and biopsy of the right larynx. The Applicant's past illnesses included glaucoma and possible COPD.

[27] The CT reports of the neck on September 14 2012 indicate a clinical history of larynx squamous cell cancer.

[28] The operative report from Dr. Seemann dated September 14, 2012 confirms that the Applicant underwent a quadroscopy, biopsy of the larynx, and right tonsillectomy. The pre and post-operative diagnosis was laryngeal and right tonsillar squamous cell carcinoma.

[29] The physicians admit advice dated September 14, 2012 indicates an admitting diagnosis of squamous cell carcinoma right tonsil.

ORAL EVIDENCE

[30] The oral evidence was primarily given by the Applicant's wife R. D. because the Applicant is required to speak with the assistance of electro larynx. The Applicant initially went

to see Dr. Moustafa Adams in August 2012 because he had a sore throat, he wasn't able to speak (the Applicant's wife said that she couldn't understand him on the phone), and he was barely able to swallow food. He was referred to Dr. Seemann who diagnosed throat cancer on September 12, 2012. The Applicant then met with the oncology team in Alberta.

[31] The Applicant lived and worked in New Brunswick until he moved to Alberta in June 2012 to find better employment. His wife and family stayed in New Brunswick. In Alberta he worked in outside maintenance for the West Edmonton Mall. He continued to become weaker and by September he couldn't eat – he was taking Ensure because he couldn't swallow. He was getting weaker and put on lighter work which involved his driving other workers around the mall. He couldn't do any of the work - all of the work was done by others.

[32] They allowed him to stay on until he had enough hours to qualify for sick Employment Insurance. He continued working until October 26th, when he moved back to New Brunswick and started treatment. The telephone conversation between Service Canada and the Applicant's supervisor in Alberta does not include that he had been working on lighter duties which involved his only driving other workers around the mall.

[33] They decided to get the medical documents from Alberta after the Applicant was refused disability. They couldn't understand why he was being refused since the Applicant was clearly severely disabled - they didn't think things would become so complicated. The documents were submitted on their behalf by Tilly O'Neill Gordon, their Member of Parliament, and their understanding was that they weren't accepted because they were submitted after the filing deadline. They followed Mr. O'Neill-Gordon's advice concerning appeal procedures from the Tribunal decision.

SUBMISSIONS

[34] The Applicant's submissions:

a) The exclusion of the medical reports which are the new facts is unjust and places an unfair burden on his case;

b) The reports prove that he was being treated for squamous carcinoma in August 2012 and that in September 2012 he received a laryngeal and right tonsillar squamous cell carcinoma diagnosis;

c) He did everything he could to submit proper information relating to his CPP disability application;

d) There is no possible way that he could return to work in his condition. He went through chemotherapy and radiation treatments for throat cancer, and is fed with a G-tube. He underwent a total laryngectomy on December 6, 2013 and can only communicate with an electro larynx to speak.

e) The Applicant filed additional reports from Dr. Allain, his family doctor, dated December 17, 2014 and from Dr. McNeill, otolaryngologist, dated December 18, 2015 which confirm his severe disability and that he is unable to work for the rest of his life.

[35] The Respondent' submissions:

a) The evidence in support of the New Facts Application does not establish new facts as defined by the DESD Act;

b) The decision of the Tribunal is *res judicata* unless it can be re-opened based on new facts;

c) To allow unsuccessful applicants to have their case reheard on the basis of a diluted test for new facts would undermine the integrity of the appeal process of the CPP and the principle of finality;

d) The information submitted by the Applicant as new facts was known to him at the time of the Tribunal decision, and there is no evidence as to the steps he took at that time to find this information;

e) The information on file shows that the Applicant continued to work satisfactorily in his place of employment until October 26, 2012;

f) Since the evidence shows that the Applicant demonstrated the capacity to work after he last qualified for CPP disability on September 30, 2012, he cannot be considered to be disabled as of the end of September 2012.

ANALYSIS

[36] The Applicant must prove on a balance of probabilities that the evidence he has put forward meets the test for new material facts.

[37] According to subsection 66(1)(b) of the DESD Act, the Tribunal may rescind or amend a decision given by it in respect of CPP disability if a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence. This is often referred to as the "discoverability test".

[38] Discoverability implies that the evidence existed at the time of the original hearing. Otherwise, any evidence arising after the original hearing could routinely be found not to be discoverable.

[39] In addition, the new material fact must reasonably be expected to affect the result of the prior hearing. This is often referred to as the "materiality test".

[40] In the present case, a new material fact is a fact that existed on March 18, 2015 but could not have been discovered at that time by the Applicant with the exercise of reasonable diligence. It must also be a fact that could reasonably be expected to establish his disability, at or prior to September 30, 2012.

[41] Justice Sharlow in the Federal Court of Appeal decision in *Kent v Canada (Attorney General)*, 2004 FCA 420 stated that in the context of an application to reconsider a decision relating to entitlement to benefits under the *Canada Pension Plan*, the test for the determination of new facts should be applied in a manner that is sufficiently flexible to balance, on the one hand, the Minister's legitimate interest in the finality of decisions and the need to encourage claimants to put all their cards on the table at the earliest reasonable opportunity, and on the other hand, the legitimate interest of claimants, who are usually self-represented, in having their

claims assessed fairly, on the merits. In my view, these considerations generally require a broad and generous approach to the determination of due diligence and materiality.

[42] This approach is consistent with the Federal Court of Appeal decision in *Villani v Canada (Attorney General)* 2001 FCA 248 which states that the *CPP* is benefits-conferring legislation and ought to be interpreted in a broad and generous manner with any doubt arising from the language being resolved in favour of the claimant.

The discoverability test

[43] The Tribunal is satisfied that the new facts meet the discoverability test.

[44] The Appellant was unrepresented and had difficulty understanding why he was being denied CPP disability given that it was clear that he was unable to continue working. The Respondent's January 20, 2015 submissions were sent to him on January 23, 2015. The Tribunal noted that the Respondent's submissions were filed beyond the January 2, 2015 filing period set out in the Notice of Hearing. They could not be considered to be responding materials since the Applicant had not filed any documents during the filing period. These submissions (see paragraphs 18 & 19, supra) clarified that the Respondent recognized that the Appellant was disabled as of October 2012, and that the reason he was being denied disability was because he had not established that he was disabled as of the end of September 2012.

[45] It was reasonable for the Applicant to then attempt to obtain the medical reports from Alberta, which up to that point he did not consider to be necessary. Since Dr. Moustafa Adams' report enclosing the Alberta medical documentation is dated February 12, 2015 (within three weeks of the Appellant receiving the Respondent's submissions), the Tribunal is satisfied that the Applicant exercised reasonable diligence in obtaining the reports. Prior to receipt of the Minister's submissions he did not consider the reports to have been important. It is not clear as to the date when the Applicant received those reports (although it must have been after February 12, 2015) and his representative filed them with the Tribunal on March 23, 2015, five days after the decision.

[46] The Tribunal has been guided by the *Kent* decision, supra, and is satisfied that that the Appellant acted with reasonable diligence in obtaining the medical reports from Alberta and that they were not before the Tribunal when it made the initial decision.

The materiality test

[47] The Tribunal is also satisfied that the new facts meet the materiality test since they may reasonably be expected to have affected the results of the initial decision.

[48] The Tribunal recognizes that the initial Tribunal Member was aware of the Applicant's diagnosis and treatment in Alberta when she made the initial decision; however, it is the capacity to work and not the diagnosis of the disease that determines whether the disability is severe (*Klabouch* v. *Canada (Minister of Social Development)*, 2008 FCA 33).

[49] The new fact reports not only confirm the diagnosis and treatment, but they set out evidence of a deterioration of the Applicant's condition that likely affected his capacity to work as of September 2012. Dr. Moustafa Adams' February 12, 2015 report indicates that as of September 2012 the Appellant had difficulty swallowing and a chronic hoarse voice. Dr. Seemann's September 13, 2012 report indicates disabling conditions including dysphagia, throat pain, and a hoarse voice; that the Appellant had noticed pain in his throat starting in May; that his voice quality had been getting worse; that he had been having increased dysphagia; that he was finding foods harder to swallow; and that he noted pain in his right ear as well.

[50] The Tribunal is satisfied that if the initial Tribunal Member had been aware of the potential extent of the deterioration in the Applicant condition as September 2012 this would have likely have influenced her decision to proceed with an On the Record determination as opposed to deciding to have a hearing involving oral evidence. In the Notice of Hearing (see paragraph 16, supra) the Tribunal indicated that the reasons for having initially determined that the hearing should proceed On the Record included the issues under appeal are not complex and that there no gaps in the information in the file or need for clarification. The Notice also set out that the Tribunal Member may decide that a hearing is needed depending on what additional information is received.

[51] The deterioration of the Appellant's condition in September as evidenced by the new fact reports indicates that the issues are complex. It also indicates that there are gaps in the information and a need for clarification concerning the Applicant's deteriorating condition and the details of his continued employment for a very short period after September 2012. It is reasonable to expect that the Tribunal Member, if aware of these new fact reports, would have reconsidered her decision as to the form of hearing and proceeded with a hearing involving oral evidence. The Tribunal Member would have then have had before her the oral evidence which was available at this hearing.

[52] The Tribunal finds that the new facts would have likely affected the results of the initial decision.

Determination on New Facts Issue

[53] The Tribunal finds that the evidence establishes "new facts" within the meaning of subsection 66(1)(b) of the DESD Act.

Severe and Prolonged

[54] Since the Tribunal has determined that the New Facts Application establishes the existence of new facts, it is necessary to make a determination whether the Applicant's disability was severe and prolonged as of September 30, 2012.

[55] In making this determination the Tribunal has considered all of the medical evidence and other documents that were before the initial Tribunal Member, the "new facts", the additional reports from Dr. Allain dated December 17, 2014 and Dr. McNeill dated December 18, 2015, as well as the oral evidence.

[56] In this regard the Tribunal has noted that the Respondent acknowledges that the Applicant was disabled as of October 26, 2012. Accordingly, the primary issue that the Tribunal must determine is whether his disability had progressed to severe and prolonged as at September 30, 2012.

[57] The Tribunal accepts the oral evidence concerning the deterioration of the Applicant's condition in September 2012. The oral evidence establishes that as of September 2012 he

wasn't able to speak and was barely able to swallow food; he was becoming weaker; and because of increasing dysphagia he wasn't able to eat and was taking Ensure. Significantly, this evidence is consistent with and confirmed by the new facts medical reports.

[58] The Applicant was put on lighter duties because he was no longer able to perform his usual employment; his lighter duties consisted only of driving around other workers because he was unable to perform the work. He had a benevolent employer who agreed to a short term continuation of his employment until he had sufficient hours to qualify for sick Employment Insurance sick benefits. An Appellant is not expected to find a philanthropic, supportive, and flexible employer who is prepared to accommodate his disabilities: *MHRD v Bennett* (July 10, 1997) CP 4757 (PAB).

[59] The mere fact that someone continues to work after the minimum qualifying period should not automatically preclude him from entitlement to a disability pension. Applicants with disabilities, who continue to work after the minimum qualifying period must be commended, not discouraged, for making an effort to remain financially self-supporting. In the end, what must be decided, where they do work, is whether they have, in fact, the capacity to regularly pursue substantially gainful employment: *Stanziano v MHRD* (November, 2002) CP 17296 (PAB).

[60] The Applicant was working at a "made up" short term position specifically created for him by "a philanthropic, supportive, and flexible employer" to enable him to qualify for Employment Insurance sick benefits. The Tribunal is satisfied that the Applicant's continuing to work for a very short time after September 30, 2012 did not evidence a continuing capacity ability to pursue substantially gainful employment.

[61] The Tribunal finds that the Applicant has established, on the balance of probabilities, a severe disability in accordance with the CPP criteria.

CONCLUSION

[62] The Tribunal finds that the Applicant had a severe and prolonged disability in September 2012, when his condition had deteriorated. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as January 2013.

[63] Both the New Facts Application and the appeal are allowed.

Raymond Raphael
Member, General Division - Income Security