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

Citation: *B. J. v. Minister of Employment and Social Development*, 2017 SSTGDIS 60

Tribunal File Number: GP-16-496

BETWEEN:

B. J.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Brian Rodenhurst

DATE OF DECISION: May 15, 2017

REASONS AND DECISION

PRELIMINARY ISSUES

[1] On March 16, 2017 the Applicant and Respondent were informed the Tribunal intended to proceed to make a decision on the basis of the documents and submissions filed. The parties were further notified that additional documents or submissions must be received by the Tribunal no later than March 31, 2017. The response period was stipulated as April 14, 2017.

[2] The Social Security Tribunal has not received any further documents although the Member gave the parties additional 30 days beyond the response period in the interests of caution. The Tribunal waited 30 days beyond the response period to issue the decision.

INTRODUCTION

[3] The Applicant's application for a *Canada Pension Plan* (CPP) disability pension was date stamped by the Respondent on May 1, 2012. The Respondent denied the application initially and upon reconsideration. The Applicant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[4] This application involves a request to rescind or amend a decision of the General Division of the Social Security Tribunal. The General Division heard the appeal of the Respondents denial of the Applicant's application for a disability pension on August 27, 2015. On October 14, 2015, the General Division determined that Applicant had a severe and prolonged disability in July 2013 and in accordance with section 69 of the Canada Pension Plan payments started four months after the date of disability being November 2013. The Applicant filed an application with the General Division to rescind or amend that decision in accordance with section 66 of the Department of Employment and Social Development Act (DESD Act).

[5] This request to rescind or amend was decided on the basis of the documents and submissions filed for the following reasons:

a) The Member has decided that a further hearing is not required.

b) There are no gaps in the information in the file or need for clarification.

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.

THE LAW - SEVERE AND PROLONGED DISABILITY

[6] 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).

[7] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[8] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

THE LAW - RESCIND AND AMEND

[9] Subsection 66(1) of the DESD gives the Tribunal authority to rescind or amend a decision in any case, 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. The Application must be made

within one year after the date the decision is communicated to the Appellant. The decision may be amended or rescinded by the same Division that made it.

ISSUE

[10] The Tribunal must decide whether the evidence filed in support of the Application to Rescind or Amend establishes a new material fact within the meaning of paragraph 66(1)(b) of the DESD Act.

[11] If the Tribunal finds that there is a new material fact within the meaning of paragraph 66(1)(b) of the DESD Act, the Tribunal must then decide whether the Applicant's disability was severe and prolonged within the meaning of the Canada Pension Plan (CPP) as of the date of the MQP.

[12] The Tribunal must decide whether the proposed settlement received and signed by the Applicant is admissible evidence in support of the Applicant's application to rescind or amend. The Tribunal must decide in the event the offer to settle by the Respondent to the Applicant is admissible whether this document establishes a new material fact within paragraph 66(1)(b) of the DESD Act.

[13] The Tribunal must decide whether the Respondent has a duty of care to the Applicant.

BACKGROUND

[14] The Applicant applied for a disability pension date stamped May 1, 2012. The MQP based on the Record of Earnings was December 31, 2013. The application was denied by the Minister and the denial was confirmed upon reconsideration dated November 30, 2012. Upon receiving an extension of time to appeal the reconsideration decision the late appeal of May 23, 2013 proceeded to an in-person hearing. As a result of the in-person hearing (August 27, 2015) the General Division issued a decision dated October 14, 2015.

[15] The General Division decision noted documents were produced at the hearing and the Member admitted them into evidence. The Member wrote the documents were recent and, with the exception of the clinical notes and records, could not be provided earlier. The Member further decided they went to the very heart of the matter and as the previous representative of

the Applicant had been disbarred it was unfair to punish the Appellant for the inaction of the disbarred lawyer. The member therefore allowed the admission of the new medical information produced by the Applicant at the hearing.

[16] The General Division directed the Minister be provided with the documents and this instruction was carried out on September 9, 2015. The Minister was given until October 9, 2015 to provided further submissions. As of the date of the Decision the Member noted no submissions had been received from the Respondent concerning the newly filed medical information.

[17] The General Division therefore rendered its Decision on October 14, 2015. The General Division found the Applicant suffered from a severe and prolonged disability on July 2013 and in accordance with section 69 of the Canada Pension Plan payments commenced four months after the date of disability, November 2013.

[18] Concurrently with the General Division awaiting submissions from the Minister the Applicant was sent a Settlement Proposal on October 5, 2015. The General Division was not informed of the proposed settlement being offered to the Applicant as the Minster did not respond to the request for submissions. Therefore, the General Division could not consider delaying the issuance of the Decision until the Agreement Offer was finalized either by acceptance or rejection by the Applicant.

[19] The Agreement Offer was signed by the Applicant on October 9, 2015. The Minister indicated the Agreement Offer was received by the Department on October 19, 2015. The Applicant filed the Application to Rescind or Amend on January 19, 2016.

[20] The Applicant was sent a letter dated March 2, 2015 signed by an operations manager, General Division. The letter indicated the Social Security Tribunal has been informed that Mr. Farant (Applicant's lawyer) was no longer permitted to practice law as his licence was revoked. The letter then informed the Appellant as follows: "However, if you wish to retain a new representative, you may complete an Authorization to Disclose form and send it to the Tribunal. We have attached a copy of the form for your convenience. If you choose a new representative, all future correspondence regarding this appeal will only be sent to him, with the exception of

the notice of hearing and the final decision which the Tribunal will send to you". The Authorization to Disclose was filed with the SST on August 6, 2015.

[21] The new representative of the Appellant was Lou Vadala, Barrister and Solicitor as acknowledged in a letter addressed to the Representative and the Applicant on August 19, 2015. The letter further stated the records had been updated and all parties informed of the new representation. The Minister sent the letter containing the proposed settlement of her appeal on October 5, 2015 addressed to the Applicant with the statement: "If you have a representative, you may want to bring this letter to their attention". The letter proposing settlement was copied (c.c.) to Mr. John Farant, Barrister and Solicitor, 1786 Bath Road, Kingston, Ontario the former disbarred representative.

[22] The proposed settlement contained two documents consisting of an Agreement and Withdrawal Notice was executed by the Applicant on October 9, 2015 and according to the Applicant's lawyer mailed as soon as they were signed. The lawyer further indicated that when it became apparent the settlement documents may not have been brought to the attention of the Member or, as they may have been misdelivered (sic) the documents were faxed to the Medical Adjudicator on October 26, 2015.

SUBMISSIONS

[23] The Respondent submitted that the evidence filed does not constitute new facts and the Tribunal cannot reopen the final decision of the SST because.

a) The Minister's Agreement Offer could not have possibly been discovered by the Applicant at the time of the hearing with the exercise of reasonable diligence. Discoverability implies the evidence must have existed at the time of the original hearing.

b) The settlement offer cannot be submitted as evidence as it is privileged.

c) The Tribunal itself reached a decision and the Member was now *functus officio* of the decision and could not have endorsed the settlement in any event.

[24] The Appellant submitted that the Decision should be rescinded and amended to reflect the terms of the proposed settlement because:

a) The Applicant had thirty days to return the completed documents. The documents were duly and fully executed by the Applicant on October 9, 2015.

b) The documents were sent to the Respondent as soon as the Applicant had executed them. In the event the mail was not delivered to the correct office the documents were faxed within the 30 day time period stipulated on the proposed settlement.

c) The Applicant was entitled to rely on the representation of Ms. Stowe (Medical Adjudicator) in indicating that the documents were to be delivered within 30 days of the letter of offer of settlement. The result has deprived the Applicant of some 17 months of disability pension payments.

d) In the interest of natural justice and fairness the Applicant should be able to rely on the documents from the Respondent that she completed and returned to the Respondent as instructed.

ANALYSIS – RESCIND OR AMEND

[25] The Applicant must prove on a balance of probabilities that the evidence filed in support of the Application to Rescind or Amend establishes a new material fact within the meaning of paragraph 66(1)(b) of the DESD Act.

[26] The Federal Court (*Canada (Attorney General) v. MacRae, 2008 FCA* 82) set out the test for evidence to be admissible as a new fact. The Court wrote it must establish a fact 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 the evidence must reasonably be expected to affect the results of the prior hearing (the materiality test).

[27] The Federal Court decided in Taker v. Canada (Attorney General) 2012 FCA 39 the requirement that the fact be material means that it must be relevant to an applicant's ability to work as at the MQP.

[28] A liberal construction should be applied to so-called "social legislation" and "that benefits-conferring legislation ought to be interpreted in a broad and generous manner" (Kent v. Canada (Attorney General) 2004 FCA 420).

[29] The Respondent did not reply to the letter dated September 10, 2015 giving the Respondent an opportunity to make submissions by October 9, 2015. Instead it sent the Applicant a settlement proposal signed by a "Medical Adjudicator" on October 5, 2015. For an unknown reason this offer was sent to the disbarred former lawyer of the Appellant. There is no indication that this misstep by the Respondent caused confusion or delay on the part of the Applicant.

[30] The proposed settlement letter contained the words: "Without Prejudice" on the first page. The proposed settlement contained specific information concerning the actions that would be taken by the Respondent upon the Applicant signing the Agreement and returning it within 30 days. In bold font the letter stated: **PLEASE NOTE: We will send the Notice to Withdraw to the SST-GD on your behalf**. The proposed settlement also stated: "If you are satisfied with the terms of the agreement, you may sign the Agreement Offer and withdraw your appeal to the Social Security Tribunal. By withdrawing your appeal, the SST will close your case and will not proceed with a decision". This outlined what the Medical Adjudicator designated as Option #1. Option #1 also contained the following instructions: Complete and sign the following enclosed documents to us in the enclosed envelope within 30 days of the date of this letter. The Appellant signed the Agreement and exercising Option #1 also signed the Withdrawal Notice. Both documents were signed and witnessed on October 9, 2015. The General Division of the SST was not informed of this proposed settlement prior to the issuance of its Decision.

[31] The Applicant relied upon this representation of the Respondent and believed the matter was resolved. The Respondent was very clear to the point of using a bold font that they would send the Notice to Withdraw on her behalf if she signed and returned the documents as instructed. The Respondent did not send it as represented in the proposed settlement.

SETTLEMENT PRIVILEGE

[32] There are well-established privileges in law based on good public policy and the need for parties to communicate freely in order to instruct their counsel and facilitate a settlement based on open frank discussion without fear of prejudice at trial or hearing. The two prominent privileges are solicitor – client privilege and settlement privilege. Privileges based upon good

public policy and the need for confidentiality to ensure the efficient administration of justice and the promotion of settlements should never be interfered with lightly.

[33] Settlement privilege belongs to both parties and cannot be unilaterally waived or overridden. However, if there is a dispute over whether a binding settlement was made, or the interpretation of the settlement, then privilege may be lost on the basis the communications are relevant to establishing the existence of the agreement or as an aid in its interpretation (*Comrie v. Comrie (2001 SKCA*).

[34] There are exceptions to settlement privilege, just as there are exceptions to solicitor-client privilege. A court's determination whether to recognize an exception involves a balancing act, assessing whether the public interest in recognizing an exception outweighs the strong public interest in promoting settlement by protecting the confidentiality of settlement negotiations (*Sable Offshore Energy Inc. v. Ameron International Corp. S.C.C., June 212, 2013*).

[35] The Tribunal finds that the protection of the confidentiality of settlement negotiations is a well establish legal principle and should not be interfered with unless compelling circumstances exist. The Tribunal must determine in the unique circumstances of the proposed settlement by the Respondent whether an exception to the principle is justified.

[36] The Respondent not only proposed a settlement of the Appeal to the General Division but made a clear undertaking to the Applicant. The Respondent clearly and unequivocally wrote that if the Applicant returned the Agreement and Withdrawal within 30 days the Respondent undertook: **We will send the Notice to Withdraw to the SST-GD on your behalf**. The Applicant relied upon this however the Respondent did not send the Notice of Withdrawal to the SST-GD. The Respondent very clearly and unconditionally wrote: By withdrawing your appeal, the SST will close your case and will not proceed with a decision. The undertakings and assurances of the Respondent were not acted upon and the decision proceeded, despite the Respondent's assurances and written statements to the contrary.

[37] The letter of dated October 5, 2015 gave the Applicant a further option of not accepting this offer and she did not need to respond to the letter and the SST-GD will decide the appeal.

The Appellant did not choose this option but the Respondent and Tribunal proceeded as if this option was invoked.

[38] The confidential terms of the settlement offer is not the issue. The General Division did not need to be notified of the terms of the proposed settlement, only that a settlement was in progress and a request the Member not issue a decision and hold the file in abeyance pending settlement and closing of the file. The issue is not the terms of the settlement with regards to the issue of severe disability and the date of deemed disability but rather the misleading of the Applicant that the decision would not proceed.

[39] The circumstance of this case differs from the well-established law that the terms of settlement should not be disclosed to the decision maker and should remain confidential until the decision is rendered and then in appropriate forums only be disclosed concerning the issue of costs. The decisions reviewed by the Tribunal did not involve circumstances where the issuance of the settlement offer indicated the decision would not be issued and the party failed to inform the decision maker and then claimed privilege.

[40] During the relevant time period the General Division Tribunal Member awaited the submissions of the Respondent with regards to the new medical information filed with the SST. The Respondent did not inform the Member of any change in position concerning the import of the new medical information. Ignoring the request by the Member for submissions they corresponded directly with the Applicant and her former disbarred representative. There is not a reasonable explanation as to the reason the Respondent did not ask for the file to be placed in abeyance or otherwise notify the Tribunal Member that a settlement proposal was communicated to the Applicant. The Respondent requesting a file be place in abeyance is a common procedure when an appellant is notified of a settlement proposal.

[41] An example of the Respondent requesting an abeyance is the request dated October 27, 2016 when the Respondent asked for an extension of time to allow its Legal Department to review this file before replying to the appeal in this matter. This request was a simple one-half page letter. The request is to hold a file in abeyance is not only a common occurrence but also not an onerous process. As a result of this simple request the Member placed the appeal in abeyance for the following reason: to allow for the additional time requested by the

Respondent. Despite the simplicity of the process the Respondent did not use the process to request the abeyance for the settlement to proceed.

[42] On March 24, 2016 the Respondent emailed the SST as follows: Re: Appeal Number GP-16-496 Ms. B. J. – This is to request that the Tribunal does not proceed to render a decision on this case thereby allowing additional time for the Minister to enter into discussions with the client. The Respondent again exhibited they were aware of the simple process to request a decision not be rendered in order to enter into discussions. Reasonably the Respondent relied upon the SST not to issue a decision.

[43] After the hearing, The Respondent did not communicate any further submission so the Member issued a decision based on the Respondent's submission the Applicant did not qualify for a disability pension. The position of the Respondent changed after the review of the new medical documents however the Respondent did not find it advisable to communicate further submissions to the Member but unilaterally followed a different process. As a result the Applicant is left with a proposed settlement executed by her in good faith overridden by a decision the Respondent assured her would not proceed. The Member did not have the knowledge the Respondent changed its position not only that the Applicant was disabled but she was disabled as of December 2011.

DUTY OF CARE

[44] Jurisprudence has recognized a duty of care exists between parties under certain situations. Known as the Hedley Bryne principle first established in 1964 by the House of Lords. In essence the case and its successors stands for the legal principle that: when a party seeking information or advice from another – possessing a special skill- and trusts him to exercise due care, and that party knew or ought to have known that the first party was relying on his skill or judgment, then a duty of care will be implied. Conditions for the application of this legal principle include there has been reliance of the advice/information by the other party, and the reliance was reasonable in the circumstances. The salient feature of the principle is the party giving advice knew that the advice or information would be relied upon.

[45] The Respondent is the Minister of Employment and Social Development. A reasonable party would expect the Minister and the Minister's representatives would exercise due care and possess special skills in the exercise of their duties and responsibilities administering the *Canada Pension Plan*. The Respondent clearly advised the Applicant that certain events would occur upon the signing of the Agreement and Withdrawal and the communication of the signing within 30 days to the Respondent. It would be reasonable to expect if the Minister through authorized representatives undertook certain actions that an applicant for a disability pension could rely upon the undertaking. The Respondent clearly informed the Applicant they would notify the SST-GD and the Decision would not be issued. Relying upon this undertaking in writing there would not be any reason for the Applicant or her Representative to contact the SST and request an abeyance for the settlement process to finalize. The Applicant reasonably relied upon the Respondent to fulfill its undertaking. The Respondent did not.

[46] The Tribunal recognizes the confidentiality of settlement negotiations. The Tribunal finds that in the unique circumstances of this proposed settlement public policy dictates the Applicant's application to rescind or amend is granted. The Tribunal notes the Respondent made undertakings that were not qualified by any condition other than the Applicant sign the documents requested in the proposed settlement and return it within 30 days. There is no issue that the Respondent received the signed documents within 30 days. There was no indication that there were any other steps necessary by the Applicant to receive the terms of the proposed settlement.

[47] The Tribunal finds the public interest would not be served if applicants for a disability pension cannot rely upon the assurances of the Respondent that if they comply with directions of the Respondent then the Respondent would live up to its undertakings. The Respondent however innocently, misrepresented matters to the Applicant. The Applicant relied upon the Respondent's instructions. The Respondent knew that applicants rely upon it to exercise due care and this reliance caused the Applicant to suffer an economic loss. The exercise of due care would reasonably include the Respondent asking for an abeyance of the Tribunal file until the settlement was processed.

[48] The Tribunal finds the circumstances of the settlement proposal and the duty of care of the Respondent towards the Applicant results in an exception to the protection of the confidentiality of settlement negotiations. The Applicant relied upon the written undertaking concerning the events that would occur upon the Agreement and Notice of Withdraw being signed and returned to the Respondent within thirty days. She has suffered an economic loss by relying on the representations of the Respondent. In the specific circumstances of this application the Tribunal finds the Decision should be amended in the interests of public confidence in the integrity of the administration of the Tribunal.

[49] The Tribunal finds the (*Gorgiev v. Canada (Minister of Human Resources Development*), *2005 FCA 55*) cited by the Respondent is distinguishable from the facts of this application. In the *Gergiev* case the applicant rejected an offer and he did not rely on any undertakings by the Respondent. The *Gorgiev* case involved the disclosure of settlement terms and the rejection of the terms by the applicant being known to the decision makers at the hearing. The facts of Gorgiev are not similar to the facts of this application.

DISCOVERABILITY AND MATERIALITY

[50] The Applicant could not have discovered the Respondent failed to inform the Tribunal not to issue the decision as stated in the Respondent's letter of proposed settlement. The pertinent information was totally within the knowledge of the Respondent who failed to act as stated in the letter of October 5, 2015. The Applicant with all reasonable diligence could not have known the communication to the Tribunal did not happen. The Respondent submitted that the settlement proposal did not exist at the time of the hearing and therefore was not discoverable. The issue here is the change in position of the Respondent was due to the filing of new documents provided by the Applicant. The series of events that followed were all triggered by the filing of further medical evidence. The reaction of the Respondent is the important factor with regards to the filing of the documents.

[51] The Respondent was a party to the hearing and cannot rely upon their failure to attend the hearing to say their reaction did not meet the discoverability test. The documents were available at the hearing and the change in the position of the Respondent was based upon the documents at the hearing. The change in position was not communicated at the hearing of

August 27, 2015 however the Member deferred the decision to admit the documents and on September 9, 2015 provided the documents to the Respondent. This formed part of the hearing process as the Member considered the admissibility of the medical evidence. The Respondent was given an opportunity to make submissions and therefore the opportunity to assess and communicate their position was available during the hearing process. The hearing process continued as the Member awaited the submission due date of October 9, 2015. The Respondent was informed the submissions would be considered in the preparation of the decision. It was the due date for submissions (October 9, 2015) that the hearing process concluded. The proposed settlement arose during this period, and the fact the Respondent did not seek an abeyance and request the Tribunal not issue a decision occurred prior to the finalization of the hearing process.

[52] The terms of the proposed settlement are material. The Respondent changed its position from its submission the Applicant was not disabled within the meaning of the CPP to a position of offering a settlement based upon the Applicant being disabled as of December 2011. This relevant change in the Respondent's position was never conveyed to the Member who requested submissions and was material to the decision making process.

[53] The Tribunal finds on a balance of probabilities the Applicant established a new material fact and it was not discoverable with due diligence by the Applicant prior to the conclusion of the hearing process.

Severe and Prolonged

[54] The SST General Division by its decision rendered on October 14, 2015 found the Applicant suffered from a severe and prolonged disability on or before the MQP. The Respondent by proposed settlement acknowledged the Applicant suffered from a severe and prolonged disability as defined in the CPP.

[55] The Tribunal accepts the decision of the General Division (October, 2015) and the positon of the Respondent and finds the Applicant suffered from a severe and prolonged disability as defined in the CPP on or before the MQP and continuously since. A review of the file and documents filed supports the position of the Respondent the date of deemed disability is December 2011 for the Applicant who suffers from a severe disability as defined in the CPP.

[56] The Tribunal finds the appropriate remedy in this application to rescind/amend is to issue the decision in accordance with the proposed settlement terms authored by the Respondent.

CONCLUSION

[57] The appeal is allowed, and the decision of the General Division rendered October 14, 2015 is rescinded and amended in accordance with the following paragraph.

[58] The Tribunal finds that the Applicant had a severe and prolonged disability in December 2011 the date the Applicant stopped work. According to section 69 of the CPP, payments start four months after the date of disability. Payments start as of April 2012.

Brian Rodenhurst
Member, General Division - Income Security