



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *S. S. v. Minister of Employment and Social Development*, 2017 SSTGDIS 125

Tribunal File Number: GP-17-1398

BETWEEN:

**S. S.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Income Security Section**

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DECISION BY: Patrick O'Neil

DATE OF DECISION: September 1, 2017

## REASONS AND DECISION

[1] This application involves a request to rescind or amend a decision of the General Division of the Social Security Tribunal (Tribunal). On December 30, 2016, the General Division determined that the Appellant was not disabled within the meaning of the CPP. The Applicant filed an application with the General Division to Rescind or Amend that decision on May 17, 2017 in accordance with section 66 of the *Department of Employment and Social Development Act* (the “DESD Act”) (“Application to Rescind or Amend”).

[2] This appeal was decided on the basis of the documents and submissions filed, in other words, it was decided on the record. The Tribunal determined it did not require any additional evidence to make its decision, as all relevant evidence in the file was clear and non-contradictory. The SST’s decision was made after a review of all documentation and submissions contained in the file.

## ISSUES

[3] 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. More specifically, the Tribunal must decide if the documents presented by the applicant constitute new material facts that could not have been discovered with the exercise of reasonable diligence at the time of the hearing on December 5, 2016.

[4] 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 December 31, 2015.

## THE LAW

[5] Subsection 66(1) of the DESD Act provides *inter alia* the following:

66. (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.

### **DOCUMENT(S) SUBMITTED AS NEW FACTS**

[6] The Applicant submitted thirty-eight documents in support of the Application to Rescind or Amend. The documents were all dated prior to the in person hearing by the General Division of the Tribunal of the Applicant's application for disability benefits on December 5, 2016. More specifically, the documents were dated during the period between December 23, 2014, and November 21, 2016, inclusive. The documents are referred to in the "evidence list" of the Applicant's application.

[7] The Applicant noted in the Reasons for Application the new documentation submitted as new evidence confirms the existence and treatment of chronic pain and depression suffered by the Applicant that began in December 2014 and continues. The Applicant also noted in the Reasons for Application that he had provided his then legal representative with authorization to gather all relevant materials in preparation for the hearing of his appeal. He further indicated that he had advised his representative in preparation for the December 5, 2016, hearing of his ongoing medical treatment in 2015 and 2016, specifically related to his depression and chronic pain. The Applicant further noted it is "unclear" if the exercise of reasonable diligence required by paragraph 66(1)(b) of the DESD Act was undertaken by his then legal representative.

### **SUBMISSIONS**

[8] The Applicant submits paragraph 66(1) provides that the Tribunal may rescind or amend a decision given by it if: (a) 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.

[9] The Respondent submits the documentation filed by the Applicant in support of his Application to Rescind and Amend does not establish new material facts within the meaning of paragraph 66(1)(b) of the DESD Act.

## ANALYSIS

### **Application to Rescind or Amend – Discoverability and Materiality**

[10] 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.

[11] Before paragraph 66(1)(b) of the DESD Act came into force in April 2013, the Federal Court of Appeal (FCA) set out a test for evidence to be admissible as a “new fact” in relation to former subsection 84(2) of the CPP:

- 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).

*(Canada (Attorney General) v. MacRae, 2008 FCA 82)*

[12] Further, in *Carepa v. Canada (Minister of Social Development)*, 2006 FC 1319, the Federal Court decided that an applicant must provide evidence of what steps were taken to find the new evidence, and why it could not have been produced at the time of the hearing.

[13] The new facts test developed by the FCA in the *MacRae* decision is reproduced in subsection 66(1) of the DESD Act when it refers to new material fact discoverable through the exercise of reasonable diligence. (*S.M. v. MHRD*, 2014 SSTAD 214)

[14] All of the documentation the Applicant submits as a “new material facts” existed at the time of the original hearing. The Applicant has not put forward any evidence the documentation

he submits as new material facts could not have been discovered with the exercise of reasonable diligence. In this regard, the Tribunal noted the documents submitted as new material facts were attached to the Applicant's Application to Rescind or Amend dated May 17, 2017, being just four months subsequent to the Applicant's receipt of the Tribunal decision dated December 30, 2016, that denied his application for CPP disability benefits. There is no evidence that the Applicant and/or his current representative had any difficulty obtaining the documents. The Applicant has not provided any evidence of what steps were taken to find the new evidence, and why it could not be produced at the time of the hearing as required by the *Carepa v. Canada (MSD)* Federal Court decision.

[15] The evidence of the Applicant is to the effect he advised his then legal representative of his continuing treatment and condition prior to the hearing on December 5, 2016, and gave authorization to her to obtain additional documentation.

[16] In *MSD v. Mazzotta* (August 22, 2006), CP 22921 (PA B) the Pension Appeals Board considered whether Mr. Mazzotta exercised due diligence in locating evidence. Various reports in the possession of Mr. Mazzotta's representative were not submitted before the Review Tribunal considering Mr. Mazzotta's appeal for CPP disability benefits. The Pension Appeals Board stated the following:

“The onus was on the Respondent to demonstrate that he exercised due diligence to discover the medical reports in question. If, as it was argued, that he simply relied on those persons representing him and that they, not him, were to blame then he was bound by the actions of his agents and in our opinion he failed to exercise reasonable diligence as that term is applied in defining what amounts to ‘new fact’ evidence pursuant to Section 84(2) of the *Act*. Were it otherwise it would be open for any applicant to simply use the excuse that his agent or representative failed to exercise the due diligence required to qualify existing but unknown evidence as ‘new fact’.”

[17] The Federal Court of Appeal (FCA) in *Mazzotta v. Canada (Attorney General)*, 2007 FCA 297 held it was open to the PAB to conclude that an Applicant is bound by the actions of his agents.

[18] The Tribunal determined the evidence did not establish that the Applicant and/or his then representative could not have discovered the documents filed in support the Applicant's application by the exercise of reasonable diligence. All the documents were in existence at the time of the Tribunal hearing on December 5, 2016. The Tribunal concluded the Applicant has not met the "discoverability test" set out in the *Canada v. MacRae* FCA decision for the documents to be considered as "new material facts". Accordingly the documents filed in support of the Applicant's application to Rescind or Amend do not represent new material facts within the meaning of paragraph 66(1)(b) of the DESD Act.

[19] The Applicant has mistakenly submitted the Tribunal may rescind or amend a decision given by it pursuant to subsections 66(1)(a) or 66(1)(b) of the DESD Act. Subsection 66(1)(a) of the DESD Act applies only to Applications to Rescind or Amend a decision relating to the Employment Insurance Act and not any other case, including the within Application to Rescind or Amend a decision relating to the Canada Pension Plan.

[20] The onus is on the Applicant to prove on a balance of probabilities that the evidence filed in support of his Application to Rescind or Amend establishes a new material fact(s) that could not have been discovered before the Tribunal hearing on December 5, 2016, with the exercise of reasonable diligence. The Applicant has not provided such evidence.

[21] The Tribunal determined the evidence did not prove on a balance of probabilities that the documents submitted by the Applicant as new material facts could not have been discovered with the exercise of reasonable diligence at the time of the hearing on December 5, 2016.

[22] Accordingly, the Tribunal finds that the evidence does not establish a new material fact within the meaning of paragraph 66(1)(b) of the DESD Act.

[23] As the Tribunal finds there is no new material fact within the meaning of paragraph 66(1)(b) of the DESD Act, the Application to Rescind or Amend must be dismissed. The Tribunal is unable to decide whether the Applicant's disability was severe and prolonged within the meaning of the CPP Act as of December 31, 2015.

**CONCLUSION**

[24] The Application to Rescind or Amend is dismissed.

Patrick O'Neil  
Member, General Division - Income Security