



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. G. v. Minister of Employment and Social Development*, 2018 SST 917

Tribunal File Number: GP-18-1217

BETWEEN:

A. G.

Applicant

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Virginia Saunders

Applicant represented by: Joelle Malette

Date of decision: August 17, 2018

DECISION

[1] The application to rescind or amend the Social Security Tribunal's decision of July 10, 2017, is dismissed.

OVERVIEW

[2] The Applicant applied for a *Canada Pension Plan* (CPP) disability pension in March 2015. The Minister denied the application initially and upon reconsideration, and the Applicant appealed to the Social Security Tribunal. I heard the appeal on June 12, 2017. In a decision dated July 10, 2017, I dismissed the appeal because I found the Applicant was not incapable regularly of pursuing any substantially gainful occupation on or before December 31, 2014, the end of her Minimum Qualifying Period (MQP)¹. In May 2018, the Applicant filed an application to rescind or amend the July 2017 decision, with documents in support².

[3] 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 diligence³.

PRELIMINARY ISSUES

[4] On June 6, 2018, the Tribunal sent a letter to the parties confirming it had received the application to rescind or amend. The parties were invited to file additional documents or submissions within 30 days. They were advised that the file would then be assigned to a Tribunal Member, who would schedule a hearing or decide the application based on the information in the file.

[5] During the 30 day period, the Minister filed RA2 and RA3. These are identical except that RA2 contains a 20-page submission with 104 pages of supporting case law; whereas RA3 contains only the case law. After RA3 was sent to the parties, Tribunal staff noted that RA3 pages 93 to 98 were in French rather than English, which is the language the Applicant chose for this file. (The same issue exists with RA2 pages 113 to 118, but this went unnoticed). Tribunal

¹ RA1A-29-38

² RA1, RA1A

³ Section 66 *Department of Employment and Social Development Act*

staff contacted the Minister on July 24, 2018, and asked it to re-submit RA3 in English only. Staff then contacted the Applicant's representative and advised that a revised RA3 would be sent when it was received by the Tribunal.

[6] As of this date, the Minister has not filed a revised submission. I have decided to make my decision without it for two reasons:

- First, the non-English pages are not documents that need to be translated for this application. They are the French version of sections of the CPP that are not in issue here. It appears they were inserted in RA2 and RA3 in error, as they are in the middle of a case that is complete without them.
- Second, there is no prejudice to either party in my proceeding without waiting for this error to be cleared up. The Minister's submission is complete without the offending pages. The Applicant did not file anything further to RA1 and RA1A within the 30 day filing period, and no response period was given. The Applicant's representative was apparently unaware of any problem with the Minister's submission until contacted by the Tribunal. In any case, there was little room for confusion. The Applicant is represented by a lawyer, who would have been able to determine on her own that there was no real issue.

[7] After considering the documents and submissions in the file, I have decided that a further hearing is not required. The Applicant is represented by legal counsel. She was given an opportunity to address the issues on this application in writing, and she provided a lengthy description of her condition and activities throughout the period in question.

ISSUES

[8] Has the Applicant presented a new material fact that could not have been discovered at the time of the hearing in June 2017 with the exercise of reasonable diligence?

[9] If the answer to the above question is "yes", does the evidence establish the Applicant was disabled within the meaning of the CPP by December 31, 2014?

ANALYSIS

[10] The Applicant must show on a balance of probabilities that the new evidence meets the following two-part test⁴:

- a) The new evidence must establish a fact that existed at the time of the original hearing but was not discoverable before the original hearing by the exercise of reasonable diligence (the “discoverability test”), and
- b) The evidence must reasonably be expected to affect the results of the prior hearing (the “materiality test”).

[11] For the reasons discussed below, I have decided that the evidence presented by the Applicant does not meet the discoverability test. Because of this, I did not go on to consider whether it met the materiality test; or whether the Applicant could now be found disabled at her MQP date.

Documents presented as new facts

[12] The Applicant presented 138 pages of documents she submitted were new material facts⁵. Some of these⁶ were already in the Tribunal file in June 2017. They are not new; and they were obviously discoverable at the time of the hearing. These documents do not meet the test for discoverability.

[13] The remaining documents presented as new material facts are:

- X Hospital: Emergency records dated February 4, 2012; April 24, 2012; October 25, 2012; August 21, 2013; March 4, 2014; May 8, 2014; July 17, 2014; October 21, 2014; November 1, 24 and 25, 2014; June 5, 2015; and July 2, 2015⁷;

⁴ *Canada (Attorney General) v. Macrae*, 2008 FCA 82

⁵ RA1A-42-180

⁶ CT scan of lumbar spine March 30, 2010; CT scan of neck March 30, 2011; Dr. Ethier reports April 7, 2011 and July 9, 2012; Dr. Robinson consultation note February 28, 2013; CT scans of chest and neck August 23, 2018; Dr. Merrick report January 14, 2014; Dr. Wu CPP medical report February 24, 2015; Dr. Zaitlen report October 24, 2015; Dr. Tempier report October 26, 2015; MRI of lumbar spine October 26, 2015

⁷ RA1A-45-74, 153

- K. Rivest, nurse practitioner: notes and reports dated August 9 and 23, 2012; September 6, 2012; October 19 and 31, 2012; and November 14, 2012⁸;
- Dr. D. Singh: report dated November 4, 2012⁹;
- Dr. D. MacLean: note dated January 22, 2013¹⁰;
- Dr. B. Robinson: referral to Dr. J. Anderson dated February 28, 2013¹¹;
- Dr. B. Wu: notes and reports dated April 19, 2013; August 16, 2013; December 18, 2013; March 3, 2014; July 11, 2014; February 24, 2015; September 21, 2015; October 28, 2014; December 4, 2015; December 30, 2015; January 18, 2016; March 3, 2016; August 26, 2016; March 10, 2017; and May 6, 2017¹²;
- Dr. J. Anderson: report dated October 10, 2013¹³;
- CT scans of the head and cervical spine dated July 18, 2014¹⁴;
- Dr. S. Chiang: referral to Dr. Ethier dated October 22, 2014¹⁵;
- Dr. M. Zaitlen: reports dated October 24, 2015; and April 7, 2016¹⁶;
- X Institute: lumbar spine assessment and related documents dated February 2016¹⁷;
- MRI of right knee dated April 10, 2016¹⁸;
- Dr. J. Abouali: report dated June 17, 2016¹⁹;

⁸ RA1A-76-85, 87

⁹ RA1A-86

¹⁰ RA1A-88

¹¹ RA1A-90

¹² RA1A-91, 92, 97, 102, 103, 107-113, 119, 120-123, 136, 138-145, 154-165, 176-177, 179, 180

¹³ RA1A-95-96

¹⁴ RA1A-104-105

¹⁵ RA1A-106

¹⁶ RA1A-124-128

¹⁷ RA1A-146-152

¹⁸ RA1A-166-167

- Applicant: objection to denial of Ontario Disability Support dated August 26, 2016²⁰; and
- CT scan of paranasal sinuses dated April 30, 2017²¹.

[14] All this evidence existed in June 2017. The Applicant must show what steps she took to find it, and explain why it could not have been produced at or before the hearing²².

[15] The Applicant stated she was not in possession of the evidence at that time, and implied it was not available to her because she did not have counsel²³. The recording of the previous hearing reveals the Applicant confirmed that she had received the Tribunal file; that she had worked with someone at an NDP office to compile evidence for her appeal; and that she had not sent any other documents to the Tribunal. She expressed no concern that medical evidence was missing or that she had any difficulty getting it.

[16] The new evidence consists of consultations, tests, treatments and referrals that the Applicant must have had knowledge of, either because she was there at the time or – in the case of referral notes – would have known that a referral was being made. She obtained some medical reports before the hearing, but has not adequately explained why she did not obtain others. Her application to rescind or amend contains a lengthy description of her medical condition from the time she applied for a CPP disability pension, up to one month before the hearing in June 2017²⁴. It shows she had frequent contact with a supportive family doctor, and does not indicate in any way that she could not obtain evidence of her condition, either because of her personal circumstances or due to lack of co-operation from health care providers.

[17] The Applicant has not provided evidence of any difficulties she encountered or efforts she made before the hearing to get the documentation she has presented on this application. She has not given a satisfactory explanation for why it was not produced in June 2017 or earlier. She

¹⁹ RA1A-174-175

²⁰ RA1A-177

²¹ RA1A-178

²² *Carepa v. Canada (Minister of Social Development)*, 2006 FC 1319

²³ RA1A-3, 5

²⁴ RA1A-5-26

has not persuaded me on a balance of probabilities that the evidence meets the discoverability test.

CONCLUSION

[18] The Applicant has not presented a new material fact that could not have been discovered at the time of the hearing in June 2017 with the exercise of reasonable diligence. Therefore, the application to rescind or amend is dismissed.

Virginia Saunders
Member, General Division - Income Security