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

Citation: *CA v Minister of Employment and Social Development*, 2018 SST 1431

Tribunal File Number: GP-18-1541

BETWEEN:

C. A.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

Decision by: Brian Rodenhurst

Date of decision: September 24, 2018

Canada

INTRODUCTION

[1] This application involves a request to rescind or amend a decision of the General Division of the Social Security Tribunal (Tribunal). On March 21, 2018, the General Division determined that the Claimant did not meet the definition of severe and prolonged and dismissed her Appeal. The Applicant filed an application with the General Division to rescind or amend that decision on July 6, 2018 in accordance with section 66 of the *Department of Employment and Social Development Act* (the "DESD Act") ("Application to Rescind or Amend").

ISSUES

[2] 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.

[3] 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, 2013.

BACKGROUND AND HISTORY OF PROCEEDINGS

[4] The Appellant applied for a disability benefit on October 27, 2016. The application was denied and the denial was upheld on reconsideration. The denial was appealed to General Division. The appeal was dismissed on March 21, 2018. The General Division decision was appealed to the Social Security Tribunal Appeal Division on June 12, 2018. The Appellant also filed an application to rescind or amend on July 6, 2018.

THE LAW

[5] Subsection 66(1) of the DESD Act reads as follows:

> 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.
>
> (2) An application to rescind or amend a decision must be made within one year after the day on which a decision is communicated to the appellant.
>
> (3) Each person who is the subject of a decision may make only one application to rescind or amend that decision.
>
> (4) A decision is rescinded or amended by the same Division that made it.

DOCUMENT(S) SUBMITTED AS NEW FACTS

[6] The Applicant submitted the following documents in support of the Application to Rescind or Amend: the Claimant maintains she relies on medical documentation that was forwarded to the Appeal Division. The Claimant was given an opportunity to forward the documents to support her application to rescind or amend and despite given a reasonable length of time has not made the documents available.

[7] The Claimant did file medical information on August 8, 2018[1]. The majority of the medical documentation provided by the Claimant relates to 2015 or later. A review of the 132 pages of medical documentation indicated only a few of the pages relates to the MQP or refers to the relevant time period.

SUBMISSIONS

[8] The Applicant's submissions:

a) The medical evidence filed was not available to her and she did not know it was required based on the fact she did not understand the Minimum Qualifying Period.

[9] The Respondent's submissions:

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[1] RA2

a) The new evidence does not establish new facts. The new evidence does not provide information that would reasonably be expected to affect the outcome of the previous decision.

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).

[12] 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. The Appellant wrote that she did not know the medical evidence was required and did not understand the MQP. The lack of knowledge by the Claimant does not equate to a finding she was relieved of taking steps to produce relevant medical evidence available to her. The medical evidence existed at the time of the original hearing and was discoverable. The Appellant may have had some difficulty obtaining evidence due to moving between provinces. She did not ask seek an adjournment to obtain medical evidence and indicated she did not feel it necessary at the time of the hearing as she did not know it was required. This does not indicate she made a diligent effort to obtain medical reports due to her belief they were not necessary.

[13] In *Taker v. Canada (Attorney General)*, 2012 FCA 39, the FCA noted that the requirement that the fact be material means that it must be relevant to an applicant's ability to work as at the MQP. The medical evidence provided by the Appellant is not relevant to the date of the MQP. Dr. Joshua, Orthopaedic Surgeon noted on June 30, 2014 the Appellant has been suffering from severe swelling and pain in her left knee for about a month. It was noted that about 15 years ago she had a left knee injury and the pain was on and off but nothing as severe as a month ago. February 19, 2015 noted the Appellant was feeling OK except for knee pain. March 15, 2015 it was noted the Appellant was clinically okay.

[14] A brief note dated February 18, 2013 noted she was having surgery for skin cancer - no other issues currently. November 28, 2012 it was noted she was administered medication for airway obstruction related to pneumonia. October 30, 2012 a noted indicated she was having insomnia and medication was discussed. Clinical notes indicated she was being treated for thyroid condition in 2010 to 2012 with medication. The medical evidence filed by the Appellant cannot reasonably be expected to affect the results of the prior hearing. The medical evidence suppled in the new documentation available to General Division does not indicate any medical conditions that would render the Appellant incapable regularly of pursuing any substantially gainful occupation.

[15] I can only make a decision based on the material available. The Appellant filed 132 pages of documents post-hearing. The Appellant on July 11, 2018 was notified by letter that she had 30 days to file documents or submissions from the date of the letter. The Appellant on August 8, 2018 filed further documents. This decision is based on the filing of the August 8, 2018 documentation. ESDC noted the Appellant was relying on information not filed with the General Division. The Minister requested on August 1, 2018 that medical documentation forwarded to the SST Appeal Division become part of this application. The request was not acted upon. I cannot consider documentation not made available. There has been more than reasonable time for the filing of the medical documentation by the Appellant or any other party. I therefore proceed on the basis of the evidence before me.

[16] 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.

CONCLUSION

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

Brian Rodenhurst
Member, General Division - Income Security