



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. N. v Minister of Employment and Social Development*, 2020 SST 323

Tribunal File Number: GP-19-1932

BETWEEN:

D. N.

Applicant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Raymond Raphael

Claimant represented by: John Hammond

Teleconference hearing on: February 4, 2020

Date of decision: February 19, 2020

OVERVIEW

[1] In January 2015, the Claimant was injured in a motor vehicle accident. In December 2017, she applied for a *Canada Pension Plan* (CPP) disability pension.¹ She stated that she had been unable to work since March 2015 because of her inability to retain and process information, headaches, anxiety, as well as back and neck pain.

[2] The Minister denied the application initially and upon reconsideration. The Claimant appealed to the Social Security Tribunal (Tribunal). In August 2019, the General Division of the Tribunal dismissed the appeal.

[3] The Claimant is applying to amend or rescind that decision.

The General Division decision

[4] The General Division Member dismissed the appeal after conducting an in person hearing on August 6, 2019.

[5] A qualifying disability must be severe and prolonged.² The Claimant's disability is severe if it causes her to be incapable regularly of pursuing any substantially gainful occupation. Her disability is prolonged if it is likely to be long continued and of indefinite duration.

[6] The Claimant was required to prove that it was more likely than not that she became disabled by the end of her Minimum Qualifying Period (MQP), which was calculated based on her contributions to the CPP. Her MQP ended on December 31, 2017.³

[7] After reviewing the oral and medical evidence, the General Division Member found that the Claimant's headaches and cognitive functioning were well managed. She also found that the evidence did not support that the Claimant was unable to work at any occupation. She determined that the Claimant had failed to establish that it was more likely than not that she had a severe disability in accordance with the CPP requirements.

¹ GD2-25

² Subsection 42(2) of the CPP

³ Record of Contributions: GD6-17

ISSUE

[8] Has the Claimant established new material facts?

ANALYSIS

Test for New Facts

[9] I may amend or rescind the General Division decision if the Claimant presents a new material fact that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.⁴

[10] The Claimant must submit new information that was not readily accessible at the time of hearing. The new information must also be material – that is, it could reasonably be expected to have affected the outcome of the hearing if the Tribunal Member had known about it at the time.

[11] The test is set out in a Federal Court of Canada decision rendered in the context of the former of the subsection 84(2) of the CPP, which is almost identical to paragraph 66(1)(b) of the DESDA.⁵ The Federal Court of Appeal held that:

- (i) an applicant must establish a fact that existed at the time of the hearing but was not discoverable before the hearing by the exercise of due diligence and
- (ii) the evidence must reasonably be expected to affect the results.

[12] A new facts application is not an appeal, nor is it an opportunity to reargue the merits of a claimant's disability claim. Instead, it is a tool designed to allow the Tribunal to reopen one of its decisions if new and relevant evidence becomes known that existed but, for whatever reason, was previously undiscoverable by the exercise of reasonable diligence.⁶

⁴ Section 66(1)(b) of the *Department of Employment and Social Development Act (DESDA)*

⁵ *Canada v. MacRae*, 2008 FCA 82

⁶ *R.B. v Minister of Employment and Social Development and V.H.*, 2019 SST 29

[13] The Claimant relies on the DSM-V⁷ diagnoses and the finding that the Claimant suffers from a marked Class 4 level of impairment in adaptation in a Catastrophic Determination Assessment (CDA) report dated October 3, 2019 as new facts.⁸

[14] Dr. Kiraly, psychiatrist, made the psychiatric assessment for the CDA Dr. Kiraly's DSM-V diagnoses were major depression, somatic symptom disorder – predominantly pain, post-traumatic stress disorder, and neurocognitive disorder due to a traumatic brain injury.⁹ He determined that the Claimant had a Class 4 level of impairment in her capacity to adapt to stressful circumstances.¹⁰

[15] The Claimant saw Dr. Kiraly on July 30, 2019.¹¹ This was one week before the General Division hearing on August 7, 2019. Mr. Hammond, the Claimant's lawyer, stated that he received the report on October 3, 2019 as part of a package of reports included in the CDA. Although he mentioned that the Claimant was undergoing a CDA at the hearing, he did not request an adjournment so he could obtain and file the report.

[16] For the reasons that follow, I have determined that Claimant has not established new facts.

The Claimant and her lawyer did not exercise due diligence

[17] The information could have been presented for the hearing by the exercise of due diligence. The Claimant could have requested an adjournment until the CDA was completed. By failing to do so, she failed to exercise due diligence.

[18] Mr. Hammond stated that he didn't ask for an adjournment because he did not know how long it would take the CDA to be completed. His client was not receiving any benefits and needed the CPP disability pension as soon as possible. He stated that he could not have had the

⁷ DSM diagnoses are classifications of mental disorders set out in The Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association.

⁸ RA1-2, 18 to 21

⁹ RA1-46

¹⁰ RA1-49 to 50

¹¹ RA1-29

CDA for the hearing. He argued that stating that the Claimant should have requested an adjournment imposes an unreasonable burden with the benefit of 20-20 hindsight.

[19] I disagree.

[20] Given the time it takes to arrange these assessments, both the Claimant and Mr. Hammond must have been aware well in advance of the hearing that a CDA was being prepared. They were also aware that it might be relevant. They could have asked for the adjournment in advance of the hearing. They made a strategic choice not to do so. They should not be able to proceed with the hearing without the CDA, and then ask that the hearing be reopened based on new facts if they were not successful.

[21] I must balance 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 against the legitimate interest of claimants, who are usually self-represented, in having their claims assessed fairly, on the merits.¹²

[22] The Claimant was represented by a lawyer at the initial hearing. Due diligence for a Claimant whose representative has legal training includes considering whether an upcoming report might be relevant and whether an adjournment would be appropriate. By not requesting an adjournment, the Claimant chose to not put all of her cards on the table.

[23] In deciding that the test for due diligence has not been met, I have been guided by the Pension Appeals Board (PAB) decision in *Giampa v. Minister of Employment and Immigration*.¹³ In that case, the claimant sought to admit as new facts a psychiatric report obtained from Dr. Ahmed after the hearing. Dr. Ahmed's report was obtained after the hearing because of a comment made in a report by Dr. Fulton filed at the hearing that indicated his surprise that the applicant had not consulted a psychiatrist. The claimant's representative did not receive Dr. Fulton's report until an hour before the hearing. The PAB stated:

It should be noted that after the tardy production of Dr. Fulton's report, no adjournment was sought. Instead, a choice was made to proceed with the hearing. Whatever remedies

¹² *Kent v. The Attorney General of Canada*, 2004 FCA 420, para 35

¹³ *Giampa v. Minister of Employment and Immigration* (May 8, 1996), CPP 3255 (PAB). Although this decision is not binding, I found it persuasive.

may have been available to the Applicant on appeal, the test of due diligence is not satisfied in this case. The issue relating to possible psychiatric problems was known even if only a short time before the hearing. A decision was made to proceed notwithstanding. To allow the application now would be to condone the Applicant's choice to chance the hearing with the option to try again under section 84(2)¹⁴ if the result of the first hearing was not satisfactory.

[24] The Claimant has not satisfied the due diligence test.

The new information reiterates what was already known

[25] The CAD does not present new material information.

[26] The Claimant relies on the CDA diagnoses and catastrophic impairment finding as new facts. However, the key question in CPP cases is not the nature or name of the medical condition, but its effect on a Claimant's ability to work.¹⁵ The Claimant's capacity to work, not the diagnosis of her disease, determines the severity of his disability under the CPP.¹⁶ The symptoms and limitations described in the CDA were known and explored in detail at the initial hearing. A report that reiterates what is already known does not establish new facts.¹⁷

[27] The most significant excerpts from Dr. Kiraly's report are as follows:

Adaptation:

...

[D. N.] has poor stress tolerance and low stamina. Prior to the accident, she was able to carry out her role functions without any challenges. She was working full time in the Insurance Industry. She was able to take care of herself without any challenges. She was an independent woman. Since the accident, she has been having pain symptoms. Her pain fuels depression and depression fuels pain and the cycle keeps going on. She has not been able to return to her pre-accident level of functioning. She became socially withdrawn and isolated. She has to pace herself. She lacks patience. She is irritable. She gets upset very easily. This has affected her relationship with her family and friends. She has lost interest in all of her leisurely activities. She is forgetful. She is preoccupied with pain symptoms. She constantly worries about her future. She has word-finding issues at times. Bright light and noise bother her. Her difficulties are due to longstanding symptoms of

¹⁴ Section 84(2) of the CPP is the predecessor provision to Section 66(1)(b) of the Department of Employment and Social Development Act

¹⁵ *Ferreira v. Attorney General of Canada*, 2013 FCA 81

¹⁶ *Klabouch*, 2008 FCA 140

¹⁷ *Canada (Attorney General) v. MacRae*, 2008 FCA 82, para 17

depression, poor sleep, anxiety, cognitive difficulties, Posttraumatic Stress Disorder symptoms and Post-Concussion Syndrome.

Under this category, there is a marked or Class 4 level of impairment.

[28] There is no new evidence concerning the Claimant's symptoms and limitations in Dr. Kiraly's assessment report. The medical reports and oral evidence at the initial hearing discussed in detail the symptoms and limitations described by Dr. Kiraly.

[29] At the initial GD hearing, the Claimant testified on several occasions about her cognitive and mood difficulties. She stated that she started to "forget everything" after the accident, and on some days couldn't remember how to put her computer on. She wasn't able to count change when working in a store. When discussing her functional limitations¹⁸, she stated that she was most affected by her difficulties with speaking, remembering, concentrating, and sleeping." She stated that while working part-time at a yoga studio she suffered "anxiety and angst" if there were more than two people at the counter.

[30] There were also several reports from treatment providers and specialists who described symptoms and limitations similar to those discussed by Dr. Kiraly.

[31] In a July 2015 Dr. Tuff, psychologist, stated that the Claimant reported increased forgetfulness. She forgot to tell people things, repeated herself, and lost her train of thought.¹⁹

[32] In February 2016, Dr. Vaccherejani, neurosurgeon, saw the Claimant at a hospital head injury clinic. She told Dr. Vaccherejani that in the months following the accident she felt she was losing her mind. She also told him that the cognitive problems had been her biggest issue. She was forgetting things. Her math and spelling had been badly affected. She had word finding problems. When attempting to return to work in retail she had difficulty counting change. Dr. Vaccherejani stated that her cognitive problems were a major issue for her and "quite functionally limiting." She had failed an insurance broker examination because of her cognitive problems and lack of attention.²⁰

¹⁸ Disability questionnaire: GD2-70

¹⁹ GD2-513

²⁰ GD2-583

[33] In October 2016, Dr. Vaidyanath, physiatrist, stated that the Claimant's complaints included sleep disturbance and fatigue, mood disturbance, and cognitive symptoms. He stated the Claimant had suffered a concussion and a mild traumatic brain injury. She had persistent symptoms including depression and irritability. She could not perform the tasks of her pre-accident employment because of her memory and concentration difficulties.²¹

[34] In September 2017, Dr. Goldstein, neurologist, stated that the Claimant's persisting symptoms included cognitive problems, sleep difficulties, and emotional difficulties. His diagnoses included possible concussive brain injury, psychological reaction to trauma, post-traumatic sleep difficulties, and multi-factorial cognitive dysfunction.²²

[35] In the December 2017 CPP medical report, Dr. Olisa, the Claimant's family doctor, diagnosed insomnia, cognitive dysfunction, concussion, traumatic brain injury, mechanical cervical neck pain (whiplash), myofascial pain syndrome, and anxiety. Dr. Olisa stated that the Claimant's symptoms were primarily related to her concussion and cognitive residual issues with poor concentration, headaches, anxiety, and psychological effects.²³

[36] The CDA does not provide new information that could reasonably be expected to have affected the outcome of the hearing. It sets out a "rehash" of the Claimant's symptoms and limitations that were before the General Division member.²⁴

CONCLUSION

[37] The application is dismissed.

Raymond Raphael
Member, General Division - Income Security

²¹ GD2-83, 96, and 99

²² GD2-117 to 118, 126 to 127

²³ GD2-59 to 60

²⁴ *Taylor v. Canada (Minister of Human Resources Development)*, 2005 FCA 293, para 14