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

Citation: *K. L. v Minister of Employment and Social Development*, 2020 SST 648

Tribunal File Number: GP-20-62

BETWEEN:

K. L.

Applicant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Shannon Russell

Minister's representative: Heather Carr

Teleconference hearing on: April 22, 2020

Date of decision: May 11, 2020

Canada

DECISION

[1] The Application to Rescind or Amend the Social Security Tribunal's decision of March 2019 is denied.

OVERVIEW

[2] The Claimant is a 51-year-old woman who applied to have her Tribunal decision of March 2019 rescinded or amended. That decision (the March 2019 decision) held that the Claimant's disability was not severe by her Minimum Qualifying Period (MQP) of December 31, 2017.

ISSUES

[3] I must decide whether the evidence filed in support of the Application to Rescind or Amend establishes a new material fact.

[4] If I find that there is a new material fact, then I must decide whether the Claimant's disability was severe and prolonged by December 31, 2017, being the date the Claimant met the contributory requirements of the Canada Pension Plan (CPP).

ANALYSIS

The Tribunal's decision of March 2019

[5] When the Claimant applied for disability benefits in October 2016, she reported that she was unable to work because neck pain, tendonitis in both shoulders and both elbows, and carpal tunnel syndrome in both wrists[1].

[6] The Tribunal Member who heard the Claimant's appeal on February 14, 2019 decided that the Claimant was not eligible for CPP disability benefits. In his decision of March 4, 2019, the Tribunal Member explained that he dismissed the appeal because the Claimant's disability was not severe by December 31, 2017. Specifically, the member explained that:

- he found evidence of the Claimant having work capacity by December 31, 2017; and

[1] Page GD2-111

- The Claimant did not show that efforts at obtaining and maintaining employment were unsuccessful because of her condition.

Application to Rescind or Amend – Discoverability and Materiality

[7] In order for me to rescind or amend the decision of March 2019, the Claimant must show that the evidence filed in support of her Application to Rescind or Amend establishes a new material fact that could not have been discovered at the time of the hearing with the exercise of reasonable diligence[2].

[8] The legal test for new facts has two parts. The Claimant must show that each part of the test is met. Here is the two-part test[3]:

> a. The new evidence must establish a fact (usually a medical condition in the context of a CPP appeal) 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 new evidence must reasonably be expected to affect the results of the prior hearing (the "materiality test").

[9] In terms of the discoverability test and the requirement to exercise reasonable diligence, the Federal Court has held 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[4].

The proposed new facts

[10] The chart below sets out the documents the Claimant attached to her Application to Rescind or Amend the Tribunal's decision of March 2019. I will explain the significance of the shaded areas in the chart shortly. For now, it is enough to say that the documents that are shaded in light grey represent documents that were in the appeal file at the time of the February 2019

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[2] Paragraph 66(1)(b) of the *Department of Employment and Social Development Act* (DESD Act)
[3] *Canada (Attorney General)* v. *Macrae*, 2008 FCA 82. This decision was rendered in the context of subsection 84(2) of the CPP, which has since been repealed and replaced with paragraph 66(1)(b) of the DESD Act. However, I nonetheless consider *Macrae* applicable, as the DESD Act did not alter the common-law test in any significant way.
[4] *Carepa* v. *Canada (Minister of Social Development)*, 2006 FC 1319

hearing. The documents that are shaded in dark grey represent documents that are dated after the hearing of February 2019.

Document Number	**Proposed New Evidence**	**Date**	**Page Numbers**
1	Claimant's letter	April 2, 2019	RA1-4
2	Claimant's letter written with assistance from Dr. David Coates	July 12, 2019	RA1-5 to 6
3	Patient Health Questionnaire -9	Undated	RA1-7
4	Patient Health Questionnaire -9	Undated	RA1-8
5	Patient Health Questionnaire -9	September 12, 2017	RA1-9
6	Patient Health Questionnaire -9	October 3, 2017	RA1-10
7	Patient Health Questionnaire -9	Undated	RA1-11
8	Form completed by Dr. Coates	January 23, 2014	RA1-12
9	Functional Abilities Form	April 9, 2014	RA1-13
10	Functional Abilities Form	April 30, 2014	RA1-14
11	Dr. Chow's report	July 18, 2016	RA1-15 to 16
12	Operation Report	September 15, 2016	RA1-17 to 18
13	Functional Abilities Form	January 8, 2016	RA1-19 to 20
14	EMG Report	February 3, 2016	RA1-21
15	Dr. Hundt's report	November 12, 2016	RA1-22 to 23

16	Dr. Hundt's report	January 22, 2017	RA1-24
17	EMG Report	January 29, 2017	RA1-25
18	Dr. Shenava's report	February 7, 2013	RA1-26 to 27
19	Patient Health Questionnaire -9	Undated	RA1-28
20	Dr. Annisette's report	June 26, 2017	RA1-29
21	Patient Health Questionnaire -9	Undated	RA1-30 to 31
22	London Spine Centre report	November 2, 2017	RA1-32
23	Dr. Phillips' report	Undated	RA1-33 to 34
24	Patient Health Questionnaire -9	May 14, 2018	RA1-35 to 36
25	Dr. Anwar's report	June 11, 2018	RA1-37 to 38
26	Patient Health Questionnaire -9	July 20, 2018	RA1-39
27	Patient Health Questionnaire -9	September 14, 2018	RA1-40
28	Dr. Coates' report	September 25, 2018	RA1-41
29	Dr. Abdallah's report	October 1, 2018	RA1-42 to 43
30	Patient Health Questionnaire -9	October 30, 2018	RA1-44
31	Dr. Siddiqi's report	November 23, 2018	RA1-45 to 46
32	EMG report	March 24, 2019	RA1-47 and RA1-50
33	Dr. Desai's report	March 22, 2019	RA1-48 to 49

34	Fibromyalgia Impact Questionnaire	April 2, 2019	RA1-51 to 52
35	Patient Health Questionnaire -9	May 6 (no year)[5]	RA1-53
36	Patient Health Questionnaire -9	June 21, 2019	RA1-54
37	Dr. Desai's report	September 18, 2019	RA1-55 to 56
38	Patient Heath Questionnaire -9	September 27, 2019	RA1-57
39	Questionnaire	September 27, 2019	RA1-58
40	Ultrasound of both rotator cuffs	November 3, 2015	RA1-59
41	Imaging of cervical spine and right shoulder	March 17, 2016	RA1-60
42	Imaging of the mandible	October 20, 2016	RA1-61
43	Facet injection report	September 6, 2018	RA1-62
44	Epidural injection report	November 5, 2018	RA1-63
45	MRI of the cervical spine	May 27, 2019	RA1-64 to 65
46	Imaging of right shoulder and wrist	January 2014	RA1-66
47	Pain diagram	Undated	RA1-67 to 68

[5] The Claimant said it is likely 2019

The Claimant is not arguing that all of the documents attached to her application establish a new material fact

[11] The Claimant told me during the hearing that she is not arguing that every document attached to her Application to Rescind or Amend establishes a new material fact. We went through each document one by one and she told me that she does not want the following documents considered as establishing a new material fact: Documents 1, 8, 10 to 12, 15, 43, 44 and 47.

Some of the Claimant's proposed new fact documents were in the appeal file at the time of the February 2019 hearing

[12] Some of the documents that the Claimant has included with her Application to Rescind or Amend were in the appeal file at the time of the hearing in February 2019. Because these documents were already in evidence and reviewed by the tribunal member in 2019, they cannot be considered new facts. I have identified these documents in the chart above by shading them in light grey. These are the documents:

Document Number	Page in Appeal File
9	GD2-88
14	GD2-86
16	GD2-83 and GD1-12
17	GD2-82
22	GD1-11
23	GD1-9 to GD1-10
25	GD4-2
28	GD6-2
29	GD6-3
40	GD2-91
42	GD2-90

Some of the Claimant's proposed new fact documents result from testing, consultations, or information gathered after the hearing of February 2019

[13] Some of the documents that the Claimant has included with her Application to Rescind or Amend result from testing, consultations, or information gathered after the hearing of February

2019. Because the information from these reports was not in existence at the time of the hearing in February 2019, this information does not meet the test for new facts. I have identified these documents in the chart above by shading them in a dark grey. These are the documents: 2, 32 to 39 and 45.

[14] With respect to document number 2 (the letter of July 2019 that was written by the Claimant with the assistance of Dr. Coates), the Claimant and her son[6] (who assisted the Claimant during the hearing) told me that they want this letter to be considered a new fact.

[15] The Claimant and her son explained that the letter of July 2019 sets out a number of corrections to the Tribunal's decision and that a correction is a new fact. They said they could not have provided the information at the time of the hearing because they needed to wait until after the hearing to get the recording and then provide it to Dr. Coates so that he could make corrections to the tribunal's decision. They also believe that if the tribunal member had been fact-checked or had a doctor testify at the hearing, then he would have made a different decision.

[16] The Minister's representative submitted that the letter of July 2019 is not a new fact. She said the letter references pre-existing conditions. She also said the letter was written after the hearing and is more in keeping with reasons why the Claimant disagrees with the Tribunal's decision.

[17] The letter of July 12, 2019 does not establish a new material fact that could not have been discovered at the time of the hearing with the exercise of reasonable diligence. The letter is, in essence, a letter of appeal. It sets out the reasons why the Claimant believes the decision of March 2019 is incorrect. At the time of the hearing in February 2019, the decision had not yet been made. The decision is dated March 4, 2019. The decision (and the Claimant's comments about the decision) were therefore not in existence at the time of the February 2019 hearing.

[18] The Claimant told me that during her hearing of February 2019 she explained to the Tribunal member that she was waiting for more information. She also said, in response to a comment made by the Minister's representative about an adjournment, that she would have had

[6] K. L.

no way of knowing that she could have asked for an adjournment of her 2019 hearing so that she could obtain additional evidence.

[19] Even if I accepted that the Claimant did not know she could ask for an adjournment so as to obtain more evidence, I would still be unable to rescind or amend the decision of 2019. If the hearing of February 2019 was somehow deficient from a procedural fairness perspective, either because the tribunal member did not offer an adjournment or did not adjourn on his own motion, then that is a matter for the Appeal Division to decide. It is not a matter of discoverability.

The Patient Health Questionnaires do not establish a new material fact

[20] I next considered the Patient Health Questionnaires that pre-date the February 2019 hearing (documents 3 to 7, 19, 21, 24, 26, 27 and 30).

[21] Five of the Questionnaires are undated (documents 3, 4, 7, 19 and 21). I asked the Claimant if she knows the dates of these documents, and she said she does not. However, she said she completed the Questionnaires before the hearing of February 2019 and she explained that she knows this because she printed the Questionnaires in the order in which she completed them.

[22] The Claimant and her son submitted that the Patient Health Questionnaires meet the discoverability test because they were not sure if the Tribunal needed the documents. They added that the Claimant would not have known what documents might help her case. As for the materiality test, the Claimant and her son said the documents are relevant because they speak to the Claimant's depression and they show how she was feeling on the days she filled out the Questionnaires. The Claimant and her son also believe that if the Questionnaires had been available at the time of the hearing in February 2019 then perhaps the tribunal member may have focused more on the depression and/or fibromyalgia.

[23] The Minister's representative submitted that the Questionnaires do not meet the discoverability test. She explained that the Claimant completed the Questionnaires and so she was aware they existed and she could have obtained copies of them and submitted them into evidence before the hearing of February 2019.

[24] I agree with the Minister's representative. Assuming that what the Claimant says is true about having completed the undated documents before February 2019, I am unable to find that any one of the Questionnaires or all of them in totality establish a new material fact that was not discoverable before the original hearing by the exercise of reasonable diligence.

[25] First, the Claimant completed the documents herself and so she was aware that they existed. When I asked the Claimant if she could have asked her doctor for copies of these questionnaires before February 2019, the Claimant said she probably could have. The documents were therefore discoverable with the exercise of reasonable diligence.

[26] Second, the Claimant attended the hearing in 2019 and so she could have provided oral evidence about her mental health symptoms. She could have explained, for example, the nature and extent of her depression and how the condition affected her at the time of her MQP. I have listened to the recording of the 2019 hearing, and the Claimant did not say that depression prevented her from working. The tribunal member asked her if she has any other conditions (aside from pain in the neck, shoulders, elbows and wrists) that prevent her from working, and in reply the Claimant mentioned only one other condition - fibromyalgia. She later said that it is the physical conditions (and not the depression) that prevent her from working.

None of the remaining documents establishes a new material fact

[27] I turn now to the remaining documents relied on to establish a new material fact (documents 13, 18, 20, 23, 31, 41, 43, and 46).

[28] The Claimant and her son submit that the documents were not available at the time of the February 2019 hearing through reasonable diligence. They said they did not receive the reports until after the hearing, when they asked Dr. Coates for a complete copy of the Claimant's file. They explained that at the time of the hearing in February 2019, the Claimant had simply assumed that Dr. Coates had given her what she needed for her appeal. They believe that it was reasonable for the Claimant to assume she had all the necessary documents for her appeal, and they added that because the Claimant is on medication for pain and depression, she could "not be trusted" to have found all of the reports on her own. The Claimant and her son also said that

some of the reports are "personal communications" between doctors (such as reports from specialists to Dr. Coates) and thus the Claimant would not have known that those reports existed.

[29] The Minister's representative submits that the documents do not meet the discoverability test because the Claimant could have obtained copies of the documents before the hearing in February 2019.

[30] I cannot find that any of the remaining documents were not discoverable with the exercise of reasonable diligence. All of the remaining documents pre-date February 2019 and were thus in existence at the time of the February 2019 hearing. The Claimant was aware that this information existed because the evidence shows that she was either given a copy of the report (such as the Functional Capacity Form of January 2016[7]) and/or she attended an appointment in person (such as her appointment with Dr. Shenava in February 2013[8]).

[31] I do not find the "personal communications" argument compelling. The file that was before the Tribunal of February 2019 contained several reports of a similar nature (i.e. reports from a specialist to Dr. Coates)[9] and so it is reasonable to infer that the Claimant was aware that it is common practice for a specialist to send a report to the family physician after a consultation.

[32] I also do not accept that the Claimant's medications would have prevented her from obtaining the reports before the hearing in February 2019. The Claimant continued to file additional medical evidence right up until June 2018 and, therefore, she demonstrated the ability to obtain and file evidence in support of her appeal, despite her medications[10]. This is important because almost all of the remaining documents that the Claimant proposes are new facts were dated before June 2018. I also believe that the Claimant understood that her specialist consultations and test results would generate information that might be relevant to her appeal. I say this because she made a point of writing letters that set out upcoming appointments. On June 9, 2017, for example, the Claimant wrote that she had an appointment to see Dr. Annisette on June 26, 2017[11]. If the Claimant had, on the one hand, the ability to write letters about upcoming

[7] The report says the worker was given a copy of the completed Functional Abilities Form (page RA1-20)
[8] Page RA1-26
[9] See for example, the reports at pages GD1-12, GD2-86, GD4-2
[10] In June 2018, the Claimant filed a report from Dr. Anway (page GD4-3)
[11] Page GD2-14

appointments that might be relevant to her appeal then presumably she had, on the other hand, the ability to ask her doctor to provide her with a copy of her entire file. Finally, the Claimant acknowledged more than once during the hearing that if she had asked her doctor for copies of reports, she likely would have been able to get them.

No ability to consider whether the disability was severe and prolonged

[33] Given my finding that the evidence filed in support of the Application to Rescind or Amend does not establish a new material fact that could not have been discovered at the time of the hearing with the exercise of reasonable diligence, I have no authority to assess whether the Claimant's disability was severe and prolonged by December 31, 2017.

CONCLUSION

[34] The Application to Rescind or Amend is denied.

Shannon Russell
Member, General Division - Income Security