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

Citation: *P. M. v Minister of Employment and Social Development*, 2020 SST 487

Tribunal File Number: AD-20-54

BETWEEN:

P. M.

Appellant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: June 10, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Claimant is attempting, based on what she claims are new material facts, to reopen a decision to deny her Canada Pension Plan (CPP) disability benefits.

[3] The Claimant is a former insurance agent and mediator. In 2003, she was injured in a motor vehicle accident (MVA) and since then has experienced, among other conditions, neuropathic pain and symptoms from peripheral vascular disease (PVD).

[4] In January 2013, the Claimant applied for CPP disability benefits. The Minister refused her application, finding that her condition did not amount to a "severe and prolonged" disability during her minimum qualifying period (MQP), which ended on December 31, 2003.

[5] The Claimant appealed the Minister's refusal to the Social Security Tribunal's General Division. It dismissed the appeal in a decision that was later overturned by the Appeal Division for reasons of procedural fairness. The matter was returned to the General Division for a new hearing.

[6] The General Division held another hearing in July 2018 and issued its decision the following month. Once again, the General Division found that the Claimant was not disabled. The Claimant filed another appeal with the Appeal Division, but she also applied to rescind or amend the General Division's decision on the basis of new information, which she claimed had recently come to light.[1]

[7] In October 2019, the General Division declined to rescind or amend its decision. It found that none of the Claimant's post-hearing submissions were new, material, or undiscoverable at the time of the July 2018 hearing.

[1] The Appeal Division has placed this appeal on hold pending final disposition of the Claimant's rescind or amend application.

[8] On February 4, 2020, the Claimant requested leave to appeal the General Division's refusal to rescind or amend its decision. She argued that the General Division committed various errors when it found that none of her post-hearing information qualified as new facts under the law. I granted the Claimant leave to appeal because I thought her arguments had a reasonable chance of success on appeal.

[9] On April 24, 2020, the Minister filed written submissions arguing that, since the General Division did not commit any errors, its decision should stand. I decided to hold a hearing by teleconference because, in my view, the format respects the requirement under the *Social Security Tribunal Regulations* to proceed as quickly and informally as permitted by the circumstances and considerations of fairness.

[10] Now, having reviewed the record and considered the parties' oral and written submissions, I have concluded that none of the Claimant's reasons for appealing would justify overturning the General Division's decision.

ISSUES

[11] The Claimant alleges that, in coming to its decision, the General Division committed the following errors:

- It found that the Claimant or her lawyer could have asked the General Division to postpone the July 2018 hearing if they needed additional time to seek medical information;
- It found that a report from the Claimant's family physician, dated July 15, 2019, was not discoverable at the time of the July 2018 hearing but it contained previously known information;
- It found that the Claimant's hospital emergency records from her January 2013 MVA were discoverable at the time of the July 2018 hearing;
- It found that the Claimant's prescription records were discoverable at the time of the July 2018 General Division hearing;

- It found that the Claimant's blood test results were discoverable at the time of the July 2018 General Division hearing;
- It found that information about the Claimant's childhood *H. Pylori* infection could not have been reasonably expected to affect the outcome of the July 2018 hearing; and
- It suggested that the potential cost of holding another hearing on the merits of the Claimant's disability was a consideration in its decision not to rescind or amend its decision.

ANALYSIS

[12] There are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important error of fact.[2]

[13] The General Division may rescind or amend a CPP-related decision if "a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence."[3]

The General Division did not err when it found that the Claimant could have asked for more time to gather medical information

[14] The Claimant submitted an undated Mental Health Narrative[4] in advance of the second General Division hearing. In it, she stated that, after being "hit with a wave of grief" around June 2018, she realized that she was suffering from untreated mental health issues. She testified that, at the time of the July 2018 General Division hearing, she was not well enough to obtain medical records documenting those mental health issues. She said that she asked her lawyer to postpone the hearing but that her lawyer advised her against it.

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[2] *Department of Employment and Social Development Act* (DESDA), section 58(1).
[3] DESDA, section 66(1)(b).
[4] Claimant's Mental Health Narrative, RA1-24.

[15] The General Division found that the Claimant and her lawyer were aware of additional potentially relevant medical records but for "tactical" reasons chose not to request additional time to obtain them. I do not see an error in how the General addressed this issue.

[16] In its October 2019 decision, the General Division referred a June 2018 letter in which the Claimant's then-lawyer informed the Tribunal that she had requested, but not yet received, additional information from her client's family doctor and her local hospital.[5] As the General Division rightly noted, this letter indicated that the Claimant and her lawyer were aware of undisclosed health records at the time of the first hearing. In that light, those records could have been discovered with the exercise of reasonable diligence.

[17] At the time, the Claimant had the benefit of legal representation. If the Claimant's lawyer believed that material documents were forthcoming, she could have requested a postponement of the proceedings. She did not do so, even though such requests are routinely made in adjudicative forums such as administrative tribunals. The Claimant is now arguing that she was unaware that a postponement was possible and that her lawyer proceeded with the hearing against her informed consent. This is not a basis of appeal. In the absence of compelling evidence otherwise, lawyers are presumed to be competent, and they have a professional duty to comply with their clients' instructions and protect their interests. As such, I do not see how the General Division acted unfairly by relying on the Claimant's lawyer to find that she was ready to proceed with the July 2018 hearing.

[18] The Claimant also alleged that the General Division mischaracterized her Mental Health Narrative and ignored the fact that her mental health issues prevented her from realizing the extent of her problems. Again, I do not see an error. In its decision, the General Division summarized the Claimant's narrative and, from what I can see, accurately conveyed its main point—that her past psychological traumas, which had been masked by her use of narcotic pain medications, resurged after she reduced her dosages. The Claimant understandably wanted her

[5] Letter to the Tribunal from Kelli Lester, the Claimant's former lawyer, dated June 25, 2018, IS3-2.

account to be taken at face value, but the General Division, in its role as finder of fact, was within its authority to give it minimal weight.

The General Division did not err when it found that the Claimant's newly-submitted information was discoverable at the time of the July 2018 hearing

[19] The Claimant argues that the General Division erred when it found that various medical documents, which she submitted after the July 2018 hearing, did not meet the test to rescind or amend the decision to deny her benefits.

[20] I do not think that the General Division committed any errors when it found none of the Claimant's documents qualified as new material facts.

[21] First, the Claimant submitted a letter from her family physician summarizing the Claimant's medical history dating back to 2003.[6] This letter, dated July 15, 2019, obviously did not exist at the time of the July 2018 hearing but, more significantly, its contents could have been discovered by exercise of reasonable diligence at the time. As the General Division noted, the file already contained numerous other reports and clinical notes[7] that covered similar ground as Dr. Ashfield's post-hearing letter.

[22] Second, the Claimant submitted previously undisclosed blood test results[8] and prescription records.[9] The General Division found that both were discoverable at the time of the July 2018 General Division hearing, because the Claimant must have been aware that she had undergone investigations and taken medications. I agree. The Claimant argued that these records were important because they showed that she was taking high doses of narcotics and her lymphocyte count was elevated during the MQP. But for a decision to be rescinded or amended, it is not enough for new information to be material, it must also have been undiscoverable at the time of the hearing. In this case, it was reasonable to expect that the Claimant would have at least some idea of what treatment she had received over the years and where to obtain information about it. While the Claimant might not have had the knowledge or capacity to obtain it herself,

[6] Letter dated July 15, 2019 by Dr. Jane Ashfield, general practitioner, RA1-28.
[7] Clinical notes dated October 9, 2003 to August 27, 2013, GD2-68 to GD2-128.
[8] Blood test results from November 1988 to July 2018, RA1-45.
[9] Patient profile prescription record from Ryan Kennedy Pharmacy, period April 2008 to November 2018, RA1-31.

she did have a lawyer who was presumably hired, in part, to help her gather evidence in support of her case.

[23] Third, the Claimant submitted hospital records[10] related to her January 2003 MVA. She insisted that she did not remember visiting emergency until she saw a report, contained in a package of hospital records dating back to 1996, which she did not obtain until after the first hearing. The General Division found that both the Claimant and her lawyer were aware of her injuries from the January 2003 MVA and could have requested her hospital records from that time. I see no error in this finding. As the General Division noted, Dr. Ashfield's clinical notes, which were submitted to the Tribunal before the July 2018 hearing, mention the MVA and the injuries that the Claimant sustained in it, specifically temporomandibular joint dysfunction, as well as lingering pain in her left thumb and left shoulder.[11] I also note that Dr. Eric Grant, a rheumatologist, mentioned the Claimant's thumb injury in his March 2006 report.[12] With this material already on the record, the emergency report, which documented the Claimant's ongoing shoulder and neck pain two weeks after her accident, cannot be said to contain "new" facts that could not have been previously discovered with the exercise of reasonable diligence.

The General Division did not err when it found that information about the Claimant's *H. Pylori* infection could not have reasonably affected the outcome of the July 2018 hearing

[24] The Claimant has long insisted that, even though her PVD was not properly diagnosed until after the MQP, she was disabled by it before December 31, 2003. One of her challenges has been to convince decision-makers, whether they be the Minister or the General Division, that she had significant PVD-related symptoms more than 16 years ago.

[25] After the July 2018 hearing, the Claimant submitted a letter by Lisa McKnight, gastroenterologist.[13] Dr. McKnight's letter, dated November 20, 2018, indicated that the Claimant showed signs of mild gastritis and that she had tested positive for *H. Pylori*, a bacterial infection likely acquired in childhood.

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[10] Emergency record dated February 6, 2003, RA1-11.
[11] See Dr. Ashfield's clinical notes dated October 9, 2003 and November 20, 2003 (GD2-128)
[12] Report dated March 30, 2006 by Dr. Eric Grant, rheumatologist, GD2-194.
[13] Detailed in a report dated November 20, 2018 by Dr. Lisa McKnight, gastroenterologist, RA1-30.

[26] The General Division found that information about a childhood *H. Pylori* infection, provided 15 years after the MQP, could not be reasonably expected to have affected the outcome of the hearing. The General Division added that there was no evidence to suggest that the infection caused any significant disabling symptoms after December 2003.

[27] I allowed leave to appeal, in part, because I saw an arguable case that, contrary to the General Division's finding, the Claimant's *H. Pylori* infection was not just a new fact, but a material one as well. Dr. McKnight's letter was the first medical evidence to suggest that the onset of the Claimant's PVD occurred before December 31, 2003. The gastroenterologist said that the Claimant was "likely" infected with *H. Pylori* from childhood, but the General Division saw little significance in this because it saw no evidence that the bacteria caused any disabling symptoms during the MQP.

[28] However, there was evidence on the record associating *H. Pylori* with PVD. In June 2018, just before the first General Division hearing, the Claimant submitted an academic paper that established such a link.[14] The General Division did not refer to this paper in either its August 2018 disability decision or its October 2019 rescind and amend decision, and I suspect that neither of the members who presided over those respective proceedings found it relevant. However, the Claimant argued that the paper assumed greater significance once Dr. McKnight indicated that she had been likely positive for *H. Pylori* for most of her life.

[29] I have now heard arguments on this point from both parties. I have concluded that the General Division did not commit an error, either in fact or law. Dr. McKnight's letter presents new information (the Claimant has likely been positive for *H. Pylori* since childhood), but the connection between that new information and actual disability is tenuous at best. First, Dr. McKnight did not say that it was **certain** the Claimant had been infected with *H. Pylori* since childhood, only that it was **likely.** Second, even if it were confirmed that the Claimant was infected with *H. Pylori* as a child, there could be no guarantee that it actually caused her PVD as an adult. Third, *H. Pylori* is only associated with PVD; a positive test says nothing about whether PVD produces disabling symptoms and, if so, whether those symptoms were present before

[14] On June 26, 2018, the Claimant filed a package of documents with the General Division that included a research paper entitled, "Premature peripheral arterial disease - difficult diagnosis in very early presentation," by Vijay A. Doraiswammy et al., *International Journal Angiology*, Spring 2009. See IS3-18.

December 31, 2003. Although the Claimant argues that *H. Pylori* is known to have far-reaching consequences, a diagnosis cannot be equated with disability.

[30] There may be a link between *H. Pylori* and PVD, but it would be a speculative leap to find that *H. Pylori* causes disability. According to the Federal Court of Appeal,[15] new facts are material only if they can be reasonably expected to affect the outcome of a decision.[16] More to the point, new facts must be relevant to a claimant's ability to work as of the MQP.[17] The General Division may have failed to recognize that *H. Pylori* and PVD were associated, but it correctly focused on the need to find actual evidence of disability as of the MQP. In the end, the General Division found that, whether or not the Claimant had a childhood *H. Pylori* infection, the fact remained that she had not shown that her PVD symptoms prevented her from working as of December 31, 2013. I see no reason to interfere with this finding.

The General Division did not err when it referred to the expense of a second hearing on the merits of the Claimant's disability

[31] The Claimant alleges that, in deciding whether her new documents were previously discoverable, the presiding General Division member expressed reluctance to incur the cost of holding another hearing on the merits of her disability claim.

[32] I allowed leave to appeal because I thought the Claimant had an arguable case that the General Division's refusal to rescind or amend its previous decision had been guided by cost considerations above all else. Now that I have listened to the audio recording of the General Division's October 2019 hearing, I am satisfied that the presiding member struck the appropriate balance between efficiency and fairness in arriving at its decision.

[33] At the outset, it must be said that the Tribunal is required by law to keep in mind the cost of its proceedings. The *Social Security Tribunal Regulations* say that the Tribunal must determine appeals and applications "in the most expeditious and least expensive" way possible

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[15] This case, as well as others cited in this paragraph, address section 84(2) of the *Canada Pension Plan*, which was repealed and replaced by section 66 of the DESDA in 2013. The two provisions contain essentially the same wording.
[16] *Kent v Canada (Attorney General)*, 2004 FCA 420.
[17] *Taker v Canada (Attorney General)*, 2012 FCA 39; *Canada (Attorney General) v Flewin*, 2010 FCA 172.

but that it must do so fairly and justly.[18] At the hearing, the member noted that, if he were to decide that the Claimant's newly submitted evidence met the tests for materiality and discoverability, then he would likely have to conduct another hearing to determine whether, in light of that evidence, the Claimant had a severe and prolonged disability as of the MQP. The member then said:

> I mean, I think what we can do, if everybody is… because that could be a fairly expensive matter, if I do determine that the new facts tests are met, then we could reconvene a different hearing to have that full type of hearing on the merits, because I just think it could be a lot of time right now that may not be necessary. Are you comfortable with that?[19]

[34] The Claimant then asked the member questions aimed at determining what a new hearing would look like and what would be at issue. Eventually, there was this exchange:

> Claimant: And when you say it is an expensive process to have another hearing…
>
> Member: No, no, if it came to that, I would just have a registry officer call you and call [the Minister's representative] and set up a date and…
>
> Claimant: Oh, okay. No, you scared me because I thought I was going to have to pay for the next hearing.
>
> Member: No, no, you don't have to pay for anything, it's just that we, unless [the Minister's representative]… this is a complicated… I mean, the decision itself is a very complicated one because of the old MQP and because of all the… you know, I've read the decision very carefully.
>
> Claimant: I apologize for that, but… I do apologize. I put you guys through this. It's not fair and I do apologize.[20]

[35] As transcribed, this discussion is fractured, but it appears that the member was initially unsure whether to go directly to arguments on the merits of the Claimant's disability claim or to defer those arguments to a second hearing, to be held only if he found new material facts.

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[18] *Social Security Tribunal Regulations*, sections 2 and 3.
[19] Recording of hearing, 1:01:20.
[20] Recording of hearing, 1:04:30.

Although the member used the word “expensive,” it is clear to me, from listening to the entire dialogue, that he was mainly concerned with working out the most logical and efficient way to proceed. In the end, he seems to have decided that there was no point in immediately discussing the potential impact of the Claimant’s new material if he was later going to find that none of it had met the tests for materiality or discoverability. When later pressed by the Claimant to explain what he meant by “expensive,” the member indicated that the cost of a second hearing was not a factor in his thinking. I see no indication that the member compromised the Claimant’s right to fairness in a bid to save the government money. Indeed, I see precisely the opposite, since the member explicitly stated that a second hearing was his preferred option. While the member ultimately declined to reopen the General Division’s prior decision, I see nothing to suggest that his decision was driven by anything other than an impartial application of the rescission and amendment provision to the Claimant’s new material.

CONCLUSION

[36] For the reasons discussed above, I have concluded that the General Division did not commit any errors when it found that the Claimant failed to present new material facts to justify reopening its August 2018 decision.

[37] This appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	May 6, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	P. M., Appellant Hilary Perry, Representative for the Respondent