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

Citation: *D. N. v Minister of Employment and Social Development*, 2020 SST 650

Tribunal File Number: AD-20-577

BETWEEN:

D. N.

Appellant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: July 28, 2020

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Claimant is attempting to reopen a decision to deny her a Canada Pension Plan (CPP) disability pension.

[3] The Claimant was injured in a January 2015 motor vehicle accident. She applied for a CPP disability pension, claiming that she was no longer able to work because of cognitive impairments, among other conditions.

[4] The Minister refused the application, and the Claimant appealed the refusal to the Social Security Tribunal. On August 27, 2019, the Tribunal's General Division dismissed the appeal finding insufficient evidence that she had a severe disability during her Minimum Qualifying Period (MQP), which ended on December 31, 2017. In particular, the General Division found that the Claimant's cognitive deficits did not prevent her from regularly pursuing all forms of substantially gainful employment.

[5] The Claimant then filed an application to rescind or amend the General Division's decision in light of a multidisciplinary Catastrophic Determination Assessment (CDA) report that was released on October 3, 2019.[1] Another member of the General Division considered this application but decided that the CDA report did not amount to a "new material fact" under section 66 of the *Department of Employment and Social Development Act* (DESDA).

[1] Catastrophic Determination Assessment report dated October 3, 2019 by Chris Gallimore, orthopedic surgeon; Leslie Kiraly, psychiatrist; and Tazmeen Lalani, occupational therapist, RA1-16.

[6] On March 23, 2020, the Claimant requested leave to appeal from the Tribunal's Appeal Division.[2] She alleged that, in refusing to admit the CDA report, the General Division committed the following errors:

- It misinterpreted section 66 of the DESDA;
- It imposed an overly stringent test tor introducing a new material fact; and
- It erroneously found that the CDA report contained no new information.

I granted the Claimant leave to appeal because I thought her arguments had a reasonable chance of success.

[7] On June 5, 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 interests of fairness.

[8] 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

[9] The Claimant is alleging that the General Division made errors when it decided not to rescind or amend its decision on the basis of the CDA report. I have to decide the following questions:

Issue 1: Did the General Division misinterpret section 66 of the DESDA?

Issue 2: Did the General Division impose an overly stringent test for introducing new material facts?

Issue 3: Did the General Division erroneously find that there was no new information in the CDA report?

[2] The Claimant has also applied for leave to appeal the General Division's original decision dated August 27, 2019. That application is being held in abeyance pending resolution of her rescind or amend proceeding at the Tribunal.

ANALYSIS

[10] 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.[3]

Issue 1: Did the General Division misinterpret section 66 of the *DESDA*?

[11] The Claimant suggests that the General Division should not have relied on a case called *MacRae*,[4] because it addressed a provision of the *Canada Pension Plan* that has been repealed and replaced.

[12] Until 2013, rescission and amendment was governed by section 84(2) of the *Canada Pension Plan*. It read as follows:

> The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.[5]

[13] The provision did not define a "new fact." That phrase was interpreted by the Federal Court of Appeal in *MacRae*, which said:

> In order for evidence to be admissible as a "new fact," the evidence must meet a two-part test: (1) 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 (2) the evidence must reasonably be expected to affect the result of the prior hearing (the "materiality test" [emphasis added].[6]

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[3] DESDA, section 58(1).
[4] *Canada v MacRae (Attorney General)*, 2003 FCA 62.
[5] The Review Tribunal and Pension Appeals Board were later replaced, respectively, by the Social Security Tribunal's General Division and Appeal Division.
[6] *MacRae*, *Ibid*., Note 4, paragraph 16. *MacRae* itself adopted the two-part test from a line of prior cases, including *Kent v Canada (Attorney General)*, 2004 FCA 420, [2004] F.C.J. No. 2083, *Canada (Minister of Human Resources Development) v Macdonald*, 2002 FCA 48, [2002] F.C.J. No. 197; *Mazzotta v Canada (Attorney General)*, 2007 FCA 297, [2007] F.C.J. No. 1209.

[14] In 2013, section 84(2) of the *Canada Pension Plan* was repealed and replaced by section 66(1)(b) of the DESDA. The new provision incorporated the *MacRae* discoverability and materiality tests but with two potentially significant changes in wording:

> The Tribunal may rescind or amend a decision given by it in respect of any particular application 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** [emphasis added].

[15] The Minister has suggested that the phrase "new material fact" was not defined by the statute, but I have to disagree. It seems to me that the phrase is precisely defined by the words that follow it. Those words are clearly inspired by the *MacRae* definition, although not identical to it.

[16] The Claimant's lawyer, Mr. Littlejohn, submits that the differences in wording between the tests in *MacRae* and section 66(1)(b) are significant. *MacRae*, he says, imposed a more onerous burden on claimants seeking to admit post-hearing evidence than does section 66(1)(b) of the DESDA. In his view, evidence that is "not discoverable" with "due diligence" is harder to find than evidence that "could not have been discovered" with "reasonable diligence." For that reason, Mr. Littlejohn argues, the General Division should not have relied on *MacRae* when it decided that neither the CDA report, nor the information in it, were new material facts.

[17] The Minister acknowledges that there are differences in wording between the two tests but argues that they are insignificant. In the absence of specific judicial guidance about section 66(1)(a), the Minister says that the General Division was not wrong to look to *MacRae* as an authority for the tests of discoverability and materiality.

[18] I agree with the Minister: the General Division did not err in its interpretation of the law.

[19] *MacRae* examined a legal provision that no longer exists, and it put forward a principle that has been formally superseded by section 66(1)(b) of the DESDA. The Claimant argues that *MacRae* is no longer good law. Even if this is so, I am not convinced that the General Division

relied on *MacRae* to any great degree in coming to its decision. First, the General Division accurately referred to the current test at the beginning of its analysis.[7] Second, the General Division cited *MacRae* in its decision, but it also signalled its awareness that section 66(1)(b) was worded differently, describing it as "**almost** identical" to the new provision governing rescission or amendment.

[20] In any event, even if *MacRae* is technically obsolete, I still don't think it matters if the General Division cited it. I have considered the wording of the *Canada Pension Plan*'s now-repealed section 84(2) and the interpretation that *MacRae* gave it. I have compared the two to the wording of section 66(1)(b) of the DESDA and come to the conclusion that the differences between the old and new rescind or amend provisions are not as significant as the Claimant would have it.

[21] The DESDA uses the phrase "could not have been discovered" instead of *MacRae*'s "not discoverable," but I don't think the former imposes a more lenient standard than the latter. Something that can't be discovered is, in effect, impossible to discover or "undiscoverable." Under both rules, past and present, the item of evidence in question must be hidden in such a way that it can't be found unless some kind of special effort is made to unearth it.

[22] What kind of effort is required? Again, I don't think that the DESDA standard marked a significant shift, if any, from the CPP/*MacRae* standard. *MacRae* demanded "due diligence," a term that has long history of use in a wide variety of legal contexts. The word "due" suggests that something—an effort, level of alertness, a certain amount of scrutiny—is expected. This raises the question of who has the expectation. The answer can only be what case law typically demands in situations like this: a reasonable and reasonably well-informed person. Sure enough, Black's Law Dictionary defines "due diligence" as "Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances."[8] Its ornate language aside, what stands out in this definition is, again, the emphasis on reasonableness.

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[7] General Division decision, paragraph 9.
[8] *Black's Law Dictionary*, 6th Edition 1990.

[23] All of this suggests that "due diligence" and "reasonable diligence" are, for all intents and purposes, synonyms. That being so, the General Division's reference to *MacRae*, while not necessary, was not a legal error either.

Issue 2: Did the General Division impose an overly stringent test for introducing new material facts?

[24] Mr. Littlejohn alleges that the General Division applied the test for admissibility too strictly. He notes that section 66(1)(b) of the DESDA specifically requires that a new fact could not have been discovered "at the time of the hearing." He argues that, since the CDA report was not in existence on August 6, 2019, when the General Division heard the Claimant's appeal, it could not have been discovered as of that date.

[25] In order for a prior decision to be set aside on the basis of "new material facts," an applicant must show that the evidence in question:

- was in existence at the time of the initial decision;
- was unknown to the applicant during the original proceeding;
- could not have been discovered sooner with reasonable diligence; and
- would be reasonably expected to change the outcome of the prior decision.

[26] In this case, it is a given that the CDA report itself, which was issued on October 3, 2019, did not exist at the time of the original General Division hearing. The real question here is whether any of the **information** in the CDA report (assuming, for the moment, that it was material) existed at the time of the original General Division proceeding and, if so, whether the Claimant, or her legal representatives, knew or should have known about it.

[27] In its decision, the General Division highlighted what it regarded as a key fact about the CDA Report—that the medical examinations supporting its findings were underway before the original General Division hearing:

> The Claimant saw Dr. Kiraly on July 30, 2019. 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.[9]

Based on the information in the file, the General Division was right—the CDA report was in the works well before the August 7, 2019, hearing. Indeed, the report indicates that the Claimant's lawyer himself commissioned it and that the first of a series of assessments took place on July 23, 2019, with the others scheduled for July 30, 2019, August 12 and 13, 2019, and September 3, 2019.[10] The General Division found that the Claimant and her lawyer were aware that the CDA examinations were in progress (they mentioned it during the original General Division hearing[11]) and that a report was forthcoming. The General Division concluded that the Claimant and her lawyer had failed to exercise reasonable diligence by not seeking additional time to allow completion of the CDA report.

[28] In my view, the General Division's analysis was consistent with the law. Reasonable diligence goes beyond a claimant taking steps to ensure that all relevant evidence has been uncovered at the time of the hearing; it also extends to claimant doing what they can to see that the hearing is not scheduled until their case is ready. I note that the Tribunal scheduled the original hearing only after the Claimant's lawyer submitted a Notice of Readiness indicating that his client had no further documents to submit and was ready to proceed.[12] As the General Division noted, once the Claimant's lawyer initiated the catastrophic injury assessment, he had the option to ask the Tribunal to postpone the hearing pending issuance of the CDA report. He did not do so. After the hearing, the General Division did not release its decision for another 2½ weeks—more time in which the Claimant's lawyer could have requested a delay. Again, he did not do so.

[29] Mr. Littlejohn argued that, once it became aware that a potentially important report was forthcoming, the General Division should have offered the Claimant an opportunity to seek an adjournment. I disagree. For CPP disability claims, the burden of proof lies with the person seeking the benefit, not the Minister or, for that matter, the General Division. It was ultimately up to the Claimant and her lawyer to decide what evidence they wanted to put in front of the

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[9] General Division decision, paragraph 15.
[10] CDA report, RA1-16.
[11] Recording of General Division hearing held on August 6, 2019 at 116:50 minutes.
[12] Claimant's Notice of Readiness completed by Robert Littlejohn dated March 19, 2019, General Division4-3.

Tribunal. For all the presiding General Division member knew at the time, the Claimant and her lawyer might have had good reason not to disclose the CDA report once it was eventually issued. Whatever their logic for going ahead with the hearing, the General Division did not have a positive duty to chase evidence that might have had some bearing on the Claimant's case.

[30] Mr. Littlejohn insists that his colleague, who represented the Claimant at the first General Division hearing, never asked for an adjournment because (i) he wasn't sure how long it would take for the CDA report to be completed and (ii) his client had waited long enough for her CPP disability claim to be heard. The General Division rejected this argument, accusing the Claimant of having made a "strategic choice" not to "put all of her cards on the table." Again, I agree. Whether a claimant exercises reasonable diligence is a question of fact, and the General Division deserves some leeway in how it chose to characterize the Claimant's actions during this proceeding. The Claimant had been waiting nearly a year by the time she had her first General Division hearing in August 2019. If the CDA was as important as Mr. Littlejohn now says it is, then it is hard to understand why his colleague would not have asked for a brief adjournment until the report was complete. At the time, he knew the assessment was in progress and, with hindsight, we can now see that the report was finalized only eight weeks after the hearing. Mr. Littlejohn claims that he and his colleague had no way of knowing that the CDA report would be so significant to his client's case, but I find this argument disingenuous. They might not have been able to precisely predict what the report would say, but they surely must have hoped or anticipated that its conclusions would carry some weight—or else why would they have commissioned it in the first place? The purpose of the assessment was to determine whether the Claimant's injuries were "catastrophic" in the context of Ontario's statutory accident benefits regime. It is reasonable to infer that Mr. Littlejohn's office expected the resulting report to contain information that would have at least some bearing on whether the Claimant was regularly capable of a substantially gainful occupation as of the MQP.

Issue 3: Did the General Division erroneously find that there was no new information in the CDA report?

[31] The Claimant's lawyer submits that, contrary to the General Division's finding, the CDA report did contain new material facts. He says that, while the CDA report relied on material that was already on the record, it also contained an new element—a determination by a psychiatrist,

orthopedic specialist, and occupational therapist, working in concert, that the Claimant's injuries were "catastrophic." He also points to Dr. Kiraly's finding that the Claimant's psychiatric condition amounted to a Class 4 impairment under the Diagnostic and Statistical Manual of Mental Disorders – 5th Edition.

[32] On this issue, I fail to see how the General Division erred—either legally or factually.

[33] The General Division found that "the symptoms and limitations described in the CDA report were known and explored in detail at the initial hearing."[13] It then reviewed the evidence that was on the record about the Claimant's mental health. It concluded that, since Dr. Kiraly's report was nothing more than a "rehash" of evidence already known to the General Division, it could not have been reasonably expected to affect the outcome of the hearing.[14]

[34] Strictly speaking, none of this analysis was necessary. To admit new facts, a claimant must meet the tests for both discoverability **and** materiality. Once the General Division found that the CDA report could have been produced with the exercise of reasonable diligence, it did not have to consider whether its contents were material. To put it starkly, section 66(1)(b) permits the exclusion of even highly material new facts if a claimant has previously failed to take reasonable steps to include them in the record. As we have seen, the General Division made no error when it found that the Claimant could have taken requested a delay in the hearing until such time that the CDA was completed. As a result, I do not have to consider whether the General Division erred when it considered the materiality of the information in the CDA report.

[35] All that being said, I don't find fault with the General Division's analysis. The General Division rightly noted that the CDA recapitulated symptoms and complaints that were already on the record—including the Claimant's chronic pain, her depression and anxiety, and her cognitive difficulties. The General Division noted that these symptoms had been previously documented in several reports by a variety of specialists and treatment providers, among them a psychologist, a neurologist, and a neurosurgeon. What was new, if anything, was Dr. Kiraly's diagnosis confirming that the Claimant suffers from post-traumatic stress disorder and post-concussion syndrome, as well the psychiatrist's assessment of a "marked" or "Class 4" level of impairment.

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[13] General Division decision dated February 19, 2020, paragraph 26.
[14] General Division decision dated February 19, 2020, paragraph 36.

[36] However, I see no reason to second-guess the General Division's finding that this information, if known, would not have significantly changed its decision to deny the Claimant disability benefits. As the Minister noted, diagnosis does not equate to disability. What matters are a claimant's functional impairments and whether they affect his or her capacity to regularly pursue any substantially gainful occupation. Dr. Kiraly did not address those specific questions in any level of detail. The General Division was therefore entitled, as finder of fact, to find that none of the material in the CDA report was materially different from what was already on the record.

CONCLUSION

[37] 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 decision dated August 27, 2019.

[38] This appeal is therefore dismissed.

Member, Appeal Division

HEARD ON:	July 9, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	D. N., Appellant Robert Littlejohn, Representative for the Appellant James Gray, Representative for the Respondent