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

Citation: *MG v Minister of Employment and Social Development*, 2020 SST 897

Tribunal File Number: AD-20-670

BETWEEN:

M. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision and Decision by: Shirley Netten

Date of Decision: October 15, 2020

Canada

DECISION AND REASONS

Decision

[1] The application for leave (permission) to appeal is granted, and the appeal is allowed in part. The May 2020 General Division decision is rescinded. However, the application to amend the April 2019 General Division decision is denied.

Overview

[2] M. G. (Claimant) applied for a Canada Pension Plan (CPP) disability pension in June 2016. Service Canada denied his application in December 2016 and, on reconsideration, in January 2018.[1]

[3] On appeal, the Social Security Tribunal's General Division granted the disability pension. In its January 2019 decision, the General Division found that the Claimant had met the test for disability in September 2011. The General Division said that the disability pension was payable from July 2015, which was 11 months prior to the application date.

[4] In response to a request from Employment and Social Development Canada, the General Division issued a corrected decision on April 5, 2019. The new decision did not change the result — the pension remained payable from July 2015 — but it found that the Claimant had met the test for disability in April 2014 rather than September 2011.

[5] The Claimant applied to the General Division to amend the April 2019 decision.[2] The General Division denied the application on May 31, 2020. By agreement of the parties, I am setting aside the May 2020 decision based on a breach of procedural fairness.

[6] I have made a new decision on the application to amend the April 2019 decision. The Claimant has not presented a new material fact that could not have been discovered at the time of the hearing with reasonable diligence.

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[1] Service Canada was acting on behalf of the Minister of Employment and Social Development Canada.
[2] The Claimant also requested permission to appeal the April 2019 decision at the Appeal Division. My decision in AD-19-461 addresses that request.

Agreement on permission to appeal and breach of procedural fairness

[7] One of the grounds of appeal to the Appeal Division is that the General Division "failed to observe a principle of natural justice."[3] The principles of natural justice are about procedural fairness. Parties to proceedings must have a fair opportunity to present their case.

[8] On May 20, 2020, the General Division invited the Claimant to respond to the Minister's submissions, giving a deadline of June 5, 2020. The General Division received a letter from the Claimant on May 22, 2020, and went on to issue a decision on May 31, 2020. However, the Claimant's letter had been written on May 20, 2020, before (and not in response to) the invitation for submissions. The Claimant understandably believed that he had until June 5, 2020, to file his submissions. He was taken by surprise when the decision was made before he had a chance to do so.

[9] The parties agree that the General Division proceeded in a manner that was unfair. The parties agree that the appeal must succeed to the extent that the May 31, 2020, decision be set aside. I accept this agreement because it is consistent with the evidence of the sequence of events at the General Division. I give the Claimant permission to appeal, and I find that the General Division breached the principles of natural justice by issuing a decision without waiting for the Claimant's submissions.

[10] After finding an error by the General Division, the Appeal Division can rescind the General Division decision.[4] Consistent with the parties' agreement, I am rescinding the May 31, 2020 decision.

[11] The Appeal Division can also give the decision that the General Division should have given.[5] The claimant has now made his arguments on his request to amend the April 2019 General Division decision. There is no need to return this matter to the General Division. The balance of this decision addresses the question that was before the General Division in May

[3] Section 58(1)(a) of the *Department of Employment and Social Development Act* (DESDA).
[4] Section 59(1) of the DESDA.
[5] Section 59(1) of the DESDA.

2020: Has the Claimant presented a new material fact that could not have been discovered at the time of the hearing with the exercise of reasonable diligence?

The test to reopen a decision

[12] The power to amend a General Division decision about a CPP disability pension is found in section 66(1)(b) of the *Department of Employment and Social Development Act* (DESDA):

> **66 (1)** The Tribunal may rescind or amend a decision given by it in respect of any particular application if […]
>
> **(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.** [Emphasis added]

[13] So, in order to reopen the April 2019 decision, the Claimant would have to present one or more facts that are new, material, and not reasonably discoverable at the time of the hearing.

The Claimant's request to amend the April 2019 decision

[14] In his application, the Claimant wrote:[6]

> Service Canada has stated in writing, on numerous occasions, that *had I qualified December 2003*, I would be entitled to disability pension retroactive to that date. It is clear, from my tax returns, and I believe Dr Keith's documentation and testimony clearly show, that this is factually the case. I am asking the Tribunal to amend the date of my disability back to the date of my accident January 1999. [Emphasis in original]

[15] When recently asked what facts he relies upon, the Claimant wrote:[7]

> As stated, Dr Keith's letter of July 23, 2019, was written in order to formally discuss the MQP of December 2003. Dr Keith has still not been formally asked by SST, about this subject. Please ask Dr Keith concerning this matter.

[6] RA1-1.
[7] AD29-4.

The tax returns, earlier documentation and testimony are not new

[16] "New" facts are facts that the decision-maker did not know about before making a decision.

[17] The claimant gave his 2006, 2007, and 2008 tax returns to the General Division in December 2018.[8] Dr. Keith completed a Medical Report and wrote two letters to support the Claimant's application for the disability pension; these were provided to the General Division in February 2018.[9] The General Division member saw all of these documents. They are not new evidence and do not contain new facts.

[18] Similarly, Dr. Keith testified at the hearing. Since the General Division heard her testimony, it is not new evidence and does not contain new facts.

Dr. Keith's July 2019 opinion includes new facts

[19] There is one document from Dr. Keith that was not in the record at the General Division: the letter dated July 23, 2019.[10] That letter says:

> I am writing in my capacity as [the Claimant's] treating psychologist. [The Claimant] and I worked together initially after his 1999 motor vehicle accident. He sought treatment again in 2011, after his mother's motor vehicle accident.
>
> [The Claimant's] 1999 motor vehicle accident was serious and resulted in impairment. He was unable to recover sufficiently to allow him to return to his pre-1999 accident workload. When I saw him again in September 2011, he was again disabled from work.

[20] The letter presents an opinion about the Claimant's condition after the 1999 motor vehicle accident that Dr. Keith had not given before. In this sense, the letter presents new facts.

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[8] GD10.
[9] GD2-140-146, GD2-111
[10] AD1D, in file AD-19-461.

[21] There are two reasons why these new facts do not meet the test in section 66(1)(b) of the DESDA. Either reason is enough for the Claimant's application to fail.

These new facts were reasonably discoverable at the time of the hearing

[22] First, Dr. Keith's opinion could have been presented at or before the hearing, with reasonable diligence. Her opinion discussed events between 1999 and 2011, based on her contact with the Claimant during those years. This was long before the hearing date.

[23] Moreover, Service Canada told the Claimant in December 2016 that he had enough contributions to qualify if he had a disability that was severe, prolonged and continuous since December 2003.[11] The Claimant had two full years to ask Dr. Keith to provide written information supporting an earlier disability date. Instead, Dr. Keith wrote a letter in January 2018 asserting that the Claimant could no longer work as of September 2011.[12]

[24] The Claimant says that there was heated discussion about gaps in his case file at the hearing.[13] That discussion was during the Claimant's testimony, and I don't see how it prevented Dr. Keith from testifying fully and accurately about the Claimant's date of disability. Dr. Keith spoke of her contact with the Claimant after the 1999 motor vehicle accident, but she ultimately relied on her opinion that the Claimant met the test for disability in September 2011. The General Division member asked her if she had anything else to add, but she did not.

[25] The Claimant says that Dr. Keith was not asked about an earlier disability date, and he would like her to have another opportunity to testify.[14] The onus was on the Claimant to present his case to the General Division. In other words, if the Claimant believed that he met the test for disability before 2003, it was up to him to submit evidence in support of this. Realizing afterwards that the documentation was insufficient, or the testimony inadequate, does not meet the legal test for reopening a decision.

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[11] GD2-49.
[12] GD2-111.
[13] AD29-4
[14] AD1A-2, AD32-1

These new facts are not material

[26] Second, these new facts are not material. To be "material," facts must "reasonably be expected to affect the outcome."[15]

[27] Dr. Keith's opinion that the Claimant had an unspecified impairment and could not return to his pre-1999 accident workload would not necessarily lead to a finding of disability by December 2003 and continuously thereafter. But even if this evidence was persuasive, it would not be expected to affect the outcome. The Claimant would still receive the disability pension from July 2015, if he was found to be disabled before December 2003. This is because the Claimant was given the maximum retroactivity allowed under the legislation.

[28] The Claimant believes that, if he was disabled in 1999, the date of application would be irrelevant.[16] This is incorrect.[17] Section 42(2)(b) of the *Canada Pension Plan* says that

> in no case shall a person — including a contributor referred to in subparagraph 44(1)(b)(ii) — be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

[29] The Claimant applied for the disability pension in June 2016, and so his deemed date of disability cannot be earlier than March 2015. This would be his deemed date of disability whether he had become disabled in 2014, in 2003, or in 1999. Under section 69 of the *Canada Pension Plan*, payments begin the fourth month following the month of disability. Four months after March 2015 is July 2015. The Claimant's payment date would be July 2015 whether he had become disabled in 2014, 2003, or 1999.

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[15] This "materiality test" has been confirmed by the Federal Court of Appeal. See, for example, *Mazzota v Canada (Attorney General)*, 2007 FCA 297.
[16] AD1-2, AD1A-2, AD29-3
[17] It is unclear why the Claimant says that Service Canada has written that he could be entitled to a disability pension retroactive to 2003. I was unable to find any statement to this effect in Service Canada's letters.

The April 2019 decision cannot be reopened

[30] The Claimant has not presented any new facts that are material and that could not have been discovered at the time of the hearing with the exercise of reasonable diligence. I cannot reopen the April 2019 General Division decision.

Conclusion

[31] The application for permission to appeal is granted, and the appeal is allowed in part. The May 2020 General Division decision is rescinded. The Claimant's request to amend the April 2019 General Division decision is denied.

Shirley Netten
Member, Appeal Division

REPRESENTATIVES:	M. G., self-represented Viola Herbert, for the Respondent