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

Citation: *CP v Minister of Employment and Social Development*, 2020 SST 965

Tribunal File Number: AD-20-760

BETWEEN:

C. P.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: November 9, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

[2] The appeal is referred back to the General Division for reconsideration.

OVERVIEW

[3] C. P. (Claimant) worked for many years as a forklift operator. He stopped working because of mental health illness caused by workplace harassment. The Claimant applied for a Canada Pension Plan disability pension and claimed that he was disabled by his mental health illness and physical limitations.

[4] The Minister of Employment and Social Development refused the application. It decided that the Claimant's disability was not severe. The Claimant appealed this decision to the Tribunal. The Tribunal's General Division also decided that the Claimant's disability was not severe. The Claimant has appealed this decision to the Tribunal's Appeal Division, and that appeal is being dealt with separately.[1]

[5] The Claimant applied to have the General Division decision rescinded or amended based on a new material fact, being a psychiatrist's report prepared for his long-term disability insurer. The General Division considered this application. It decided that the Claimant had not met the legal test for new material fact and dismissed the application. Leave (permission) to appeal this decision to the Tribunal's Appeal Division was granted because the General Division may have based its decision on an important factual error. This decision is about that appeal.

[6] I have now considered all of the material that was filed with the Appeal Division. I have read the General Division decision, listened to the recording of the General Division hearing and read the psychiatrist's report. The General Division based its decision on an important factual error and it made an error in law. The information in the psychiatrist's report is a new material fact. The appeal is referred back to the General Division for reconsideration.

[1] See Tribunal file number AD-20-623

PRELIMINARY MATTER

[7] The Claimant appealed the General Division's decision that dismissed his disability pension claim and the decision that dismissed the application to rescind or amend the General Division decision to the Tribunal's Appeal Division. The Tribunal's Appeal Division granted leave to appeal both appeals.

[8] A pre-hearing conference with the Claimant's counsel and the Minister's representative was held. The parties discussed how these appeals would proceed, including whether they should be joined or heard together. The parties agreed that the appeal of the decision regarding the application to rescind or amend the General Division decision would proceed first. The outcome of this appeal may inform how the other appeal proceeds.

ISSUES

[9] Did the General Division base its decision on an important factual error regarding the discoverability of the psychiatrist's report?

[10] Did the General Division make an error in law when it imposed a positive obligation on the Claimant to seek an adjournment of the hearing?

ANALYSIS

[11] General Division decisions are final, subject only to an appeal to the Tribunal's Appeal Division. An appeal to the Tribunal's Appeal Division is not a re-hearing of the original claim. Instead, the Appeal Division can only decide whether the General Division:

a) failed to provide a fair process;

b) failed to decide an issue that it should have, or decided an issue that it should not have;

c) made an error in law; or

d) based its decision on an important factual error.[2]

[12] The General Division may also rescind or amend its decision if a new material fact is presented that could not have been discovered at the time of the General Division hearing with the exercise of reasonable diligence.[3] This appeal is about whether the General Division made an error when it decided that the psychiatrist's report could have been discovered at the time of the hearing with reasonable diligence.

Issue 1: Important factual error

[13] One ground of appeal that the Appeal Division can consider is whether the General Division based its decision on an important factual error. To succeed on this basis, the Claimant has to prove three things:

a) that a finding of fact was erroneous (in error);

b) that the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and

c) that the decision was based on this finding of fact.[4]

[14] Whether a new material fact is discoverable is a finding of fact.[5] The General Division found as fact that the psychiatrist's report was discoverable, and gave reasons for this.[6] The reasons include

a) The psychiatrist was hired by the insurer;

b) The Claimant went to see the psychiatrist, and the psychiatrist told him that a report would be provided to the insurer;

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[2] This paraphrases the grounds of appeal set out in s. 58(1) of the *Department of Employment and Social Development Act*
[3] *Department of Employment and Social Development Act* s. 66(1)(b)
[4] *Department of Employment and Social Development Act* s. 58(1)(c)
[5] *Kent v. Canada (Attorney General)*, 2004 FCA 420
[6] General Division decision at paras. 13 to 18

c) The lawyer knew that the assessment had taken place;

d) The Claimant and his lawyer did not know that the report had been written or what it said;

e) The Claimant had no right to receive a copy of the report, or to know what it says;

f) The lawyer's inquiries about the report made no promises of disclosure – he was told he would "hear when he hears"

[15] The General Division's finding of fact that the report was discoverable was made in error. The psychiatrist may have told the claimant that he was preparing a report, but neither the Claimant nor the lawyer knew what the report would say, nor if it would be shared with them. They had no right to demand a copy of the report. The insurer did not have to show it to them, nor disclose the psychiatrist's findings.

[16] This is not a case where the Claimant or his lawyer made a tactical decision to not produce the report, or he failed to request an adjournment of the hearing knowing that the report was being prepared.

[17] The General Division decision was made without regard for the evidence that the Claimant could not compel disclosure of this report. The decision was based on this finding of fact.

[18] Therefore, the Appeal Division must intervene on this basis.

Issue 2: Errors in law

[19] The Claimant says that the General Division also made an error in law regarding whether the psychiatrist's report was a new material fact. For something to be a new material fact, it must be a fact that existed at the time of the General Division hearing but was not discoverable with reasonable diligence.

a) The fact must exist at the time of the hearing

[20] The first consideration is whether the fact existed at the time of the General Division hearing. The psychiatrist's report did not exist then. The General Division hearing was held on June 4, 2019. The report is dated June 11. 2019.[7]

[21] However, the facts that underlie the report, or its essential content, was in existence at the time of the hearing.[8] The report refers to the Claimant having mental health illness symptoms for a number of years. These symptoms were misdiagnosed as post-traumatic stress reaction and post-traumatic stress disorder by various mental health practitioners. This is sufficient to establish that the fact in question existed at the time of the General Division hearing.

[22] Therefore, the General Division made no error when it concluded that the fact existed at the relevant time.

b) the fact was not discoverable with reasonable diligence

[23] The next consideration is whether the fact was discoverable with reasonable diligence at the time of the General Division hearing. The General Division decision states that reasonable diligence meant asking the General Division to adjourn the hearing so that the Claimant could try to get a copy of the psychiatrist's report,[9] and that by doing nothing he did not exercise reasonable diligence.[10]

[24] However, the Federal Court of Appeal decide that

> the test for the determination of new facts should be applied in a manner that is sufficiently flexible to balance, on the one hand, 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, and on the other hand, the legitimate interest of claimants, who are usually self-represented, in having their claims assessed fairly, on

[7] RA1-21
[8] *See K. G. v. Minister of Employment and Social Development*, 2018 SST 138
[9] General Division decision at para. 16
[10] General Division decision at para. 17

> the merits. In my view, these considerations generally require a broad and generous approach to the determination of due diligence and materiality.[11]

[25] There is no evidence that suggests that the Claimant made a strategic decision to not disclose this report, and only sought to present it to the Tribunal after the General Division decision did not go his way. The Claimant had not seen the report before the General Division hearing. He did not know what it would say, or what conclusions the psychiatrist would reach. In addition, he had no control over when or if the report would be prepared or shared with him.

[26] In addition, many disability appeals, like this one, are about claimants whose conditions are evolving, and change with new diagnoses and different treatment. In such cases, the legal test for new material facts should not be applied in an unduly rigid manner, depriving a claimant of a fair assessment of their claim in its merits.[12] In this case, requiring that the Claimant request and adjournment, presumably for an unknown period of time, so that a report prepared by and for a third party might be produced, results in an unduly rigid application of the test.

[27] The General Division has decided in other cases that reasonable diligence required the claimant to seek an adjournment.[13] However, the facts in those cases are different from this one. In those cases, the Claimant knew that a report was being prepared, and that they would receive a copy. The Claimant in this case did not, and he had no right to receive a copy of the report.

[28] Finally, the report in this matter contained very significant information, that may be crucial to the outcome of the appeal on the merits of the disability claim.

[29] Therefore, the General Division made an error in law when it imposed a positive obligation on the Claimant to seek an adjournment of the hearing to perhaps obtain the psychiatrist's report. The Appeal Division must intervene on this basis also.

REMEDY

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[11] Kent decision, above
[12] Kent decision, above, at para. 36
[13] See *P.M. v. Minister of Employment and Social Development*, 2019 SST 1656, *D.N. v. Minister of Employment and Social Development*, 2020 SST 323

[30] When the appeal Division intervenes, it can provide different remedies. It can

a) give the decision that the General Division should have given;

b) refer the case back to the General Division for reconsideration; or

c) confirm, rescind, or vary the General Division's decision.[14]

[31] It is appropriate that the Appeal Division give the decision that the General Division should have given about whether the psychiatrist's report is a new material fact.

[32] A new material fact is:

1. A fact that existed at the time of the General Division hearing but was not discoverable with reasonable diligence; and

2. Is reasonably expected to have affected the result of the General Division hearing.[15]

[33] For the reasons set out above, the psychiatrist's report existed at the time of the General Division hearing but was not discoverable with reasonable diligence.

[34] The psychiatrist's report is also reasonably expected to affect the result of the General Division hearing. The report contains an entirely new mental health diagnosis. It states that mental health treatment that had been tried before was ineffective because it was aimed at the wrong illness. It also states unequivocally that because of the mental health illness, the Claimant cannot work.

[35] Therefore, this document meets the legal test for new material fact.

[36] This appeal is referred back to the General Division for reconsideration of the merits of the disability claim for the following reasons:

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[14] *Department of Employment and Social Development Act* s. 59(1)

[15] *Canada (Attorney General) v. Macrae*, 2008 FCA 82. This decision was made under subsection 84(2) of the *Canada Pension Plan*, which has since been repealed and replaced with paragraph 66(1)(b) of the *Department of Employment and Social Development Act.*

a) Both parties requested that the appeal be referred back to the General Division for reconsideration;

b) The record is not complete. The parties have not had the opportunity to present evidence regarding the psychiatrist's report, any treatment that resulted from its recommendations, or the outcome of that treatment. The Claimant's evidence on this has also not been tested by the Minister; and

c) The Claimant's minimum qualifying period (the date by which a claimant must prove that they are disabled to receive the disability pension) is in the future.

CONCLUSION

[37] The appeal is allowed.

[38] The appeal is referred back to the General Division for reconsideration.

[39] The parties may wish to consider again how they wish to proceed with the appeal from the General Division decision on the merits of the disability claim in light of this decision.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	November 4, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. P., Appellant Steven Yormak, Counsel for the Appellant Susan Johnstone, Representative for the Respondent