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

Citation: *NJ v Minister of Employment and Social Development*, 2021 SST 202

Tribunal File Number: AD-21-94

BETWEEN:

N. J.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Kate Sellar

DATE OF DECISION: May 14, 2021

Canada

DECISION AND REASONS

DECISION

[1] I am dismissing the Claimant's request to change (rescind or amend) the Appeal Division decision. These reasons explain why.

OVERVIEW

[2] In May 2017, the Claimant applied for a disability pension under the *Canada Pension Plan* (CPP). He said he could not work anymore because of his anxiety, depression and post-traumatic stress disorder (PTSD).

[3] The Minister denied the Claimant's application, so the Claimant appealed to the General Division of this Tribunal. The General Division dismissed the Claimant's appeal, finding that he failed to show that he had a severe disability on or before December 31, 2014 when his minimum qualifying period (MQP) ended.[1]

[4] The Appeal Division refused the Claimant's application for leave (permission) to appeal.

[5] The Claimant filed an application to rescind or amend the Appeal Division decision.[2] I will refer to that application as the "new facts application." The Claimant received a document on October 4, 2019 that he says he did not have when his case was at the General Division. He says that if this Tribunal had considered this document, the General Division would have allowed his appeal for the disability pension.

[6] I dismiss the Claimant's new facts application. The Claimant's evidence does not establish a new material fact that can form the basis for changing the Appeal Division's decision.

PRELIMINARY MATTERS

[7] When the Claimant filed his new facts application, the Tribunal sent him a letter explaining that the parties had thirty days from February 4, 2021 to file any written arguments

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[1] The minimum qualifying period is calculated based on the contributions claimants make to the Canada Pension Plan.
[2] RA1.

they might have. Then the case would be assigned to a member of the Appeal Division who would either schedule a hearing or decide the application based on the information on file. The Minister provided its arguments to the Tribunal on February 23, 2021. The Claimant filed his written arguments on March 8, 2021.

[8] The parties had a case conference on March 29, 2021. After the case conference, the Tribunal sent a letter dated March 31, 2021. The letter confirmed that the parties agreed that they had already filed their written arguments (the Minister on February 23, 2021 and the Claimant on March 8, 2021). The letter acknowledged that the Claimant wanted to have a hearing. The Tribunal confirmed that the Appeal Division member assigned to the case would decide whether there would be a hearing.

[9] On April 16, 2021, the Claimant wrote to the Tribunal, providing additional information about his experience with medications and some research he has done on antidepressants and schizophrenia.[3] He provided links to several websites about schizophrenia. On April 28, 2021, the Claimant provided more information to the Appeal Division about the same condition.[4]

[10] On April 30, 2021 the Minister responded to the Claimant's arguments. The Minister says that the arguments the Claimant made in April should not be considered in the decision making process because:

- the Tribunal did not direct the parties to provide more argument, and
- the Claimant already filed his arguments in March 2021 and there was no conference in which the parties were invited to provide more information.

[11] In any event, according to the Minister, the information the Claimant provided is new but not material (does not have the potential to change the outcome).

[12] The Claimant called the Tribunal and asked to provide a response to the Minister's April 30, 2021 argument. The Tribunal advised him that if he needed an extension of time to make that

[3] RA4.
[4] RA5.

kind of argument he should put the request in writing. The Tribunal has not received anything further from the Claimant.

[13] The Claimant has had many chances to provide his arguments in support of his new facts application at the Appeal Division. I have considered the written argument he provided in March 2021. The documents he provided in April 2021 have played no role in my decision making. They are not relevant to what I need to decide. In some ways, they are more like evidence rather than argument because they provide general information about a particular condition. Also, it seems to me that the parties did not anticipate providing more written arguments after the case conference.

[14] I chose not to hold a further hearing by teleconference in this case as I have the parties written arguments and I have the information I need to make a decision. I must handle this case in a fair but efficient manner, and I am satisfied that I can do that without an oral hearing.[5]

ISSUES

[15] The issues are:

1. Is the Claimant's new facts application too late for me to consider?
2. Has the Claimant raised a new fact that could not have been discovered at the time of the hearing by being reasonably diligent?
3. Has the Claimant raised a new fact that is material?

ANALYSIS

New Facts Applications

[16] The law allows a dissatisfied party to ask the Appeal Division to rescind (take back) or amend (change) its decision. This is what I refer to as a "new facts application." To allow the Claimant to change a decision in this way, I must decide whether the Claimant has presented:

[5] *Social Security Tribunal Regulations*, s 2.

- a material fact ("material" means that can be reasonably expected to affect the result of the earlier hearing);[6]

- that is also "new" (it could not have been discovered at the time of the hearing by being reasonably diligent).[7]

Is the Claimant's new facts application too late for me to consider?

[17] The Claimant is not too late: I can consider his new facts application.

[18] New facts applications must be filed within a year of receiving the decision the claimant wants to change. If it was more than one year late, I would have no choice: I would not be able to decide the appeal.[8]

[19] The Claimant says that he received the Appeal Division decision on January 19, 2020 or January 20, 2020. The Appeal Division dated stamped the Claimant's new facts application on January 21, 2020.

[20] The Minister argues that the Claimant cannot make the new facts application because he filed it just past the one-year deadline in the legislation. I do not have the discretion to consider a new facts application that is more than one year late.

[21] I will not conclude that the Claimant is more than a year late with his new facts application. While I accept the Claimant's evidence about when he received the decision, I cannot be confident that the Claimant made the application past the one-year deadline.

[22] The Claimant must **make** the new facts application within one year after the day the Tribunal communicated the decision. I would normally assume that a Claimant makes a new facts application when the application arrives in the mail at the Tribunal. In this case, the Tribunal date stamped the application on January 21, 2020. However, I am not certain that was

[6] This case talks about what a material fact is: *Canada (Attorney General) v Richard*, 2008 FCA 69.
[7] DESDA, s 66(1)(b).
[8] DESDA, s 66(2).

the day it actually arrived to the Tribunal in the mail. It is merely the day that the Tribunal opened the envelope and date stamped it.

[23] The Federal Court stated once that when deciding what **making** an application for CPP disability benefits to the Minister actually means, the Appeal Division should consider the purpose of the legislation. The purpose of the CPP is in part to pay benefits to those who have paid into the program.[9] In that case, the Federal Court found an Appeal Division decision unreasonable because it assumed (without providing explanation) that an application is only received when it is opened and date stamped by the Minister.

[24] Given changes to Tribunal operations during the COVID-19 pandemic, I lack the confidence I might otherwise have that the Claimant's materials were date stamped on the same day that they actually arrived to the Tribunal in the mail. It is quite possible that the Claimant's materials were date stamped later than when they were actually received, by a day or possibly more.

[25] As I cannot conclude that the Tribunal actually received the materials as late as January 21, 2020 (the date they were stamped), I cannot conclude that the Claimant is over the one-year mark.

[26] I will consider the Claimant's new facts application because I find that the Claimant made the application, at the latest, when it was delivered to the Tribunal. The application was likely delivered at least one day before the Tribunal date stamped it, and it is therefore not too late to consider.

Was the Claimant's evidence discoverable before the tribunal hearings?

[27] The evidence that the Claimant wants to rely on was discoverable before the Appeal Division hearing. Even if what the Claimant really meant to do was to provide a new facts application to challenge the General Division decision, the evidence he relies on was discoverable before the General Division hearing as well.

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[9] *Mason v Canada (Employment and Social Development)*, 2017 FC 358.

[28] The Claimant wants to rely on a mental health and substance use (MHSU) screening document provided by a local hospital. An intake worker completed the screening document, which is dated April 28, 2015.

[29] The General Division decision analyzes the evidence from the Claimant's family doctor about his mental health. The General Division questioned why the Claimant did not seek more assistance from his family doctor from 2014 to 2016 for his mental health conditions if they were serious at that time. In the decision, the General Division member describes asking the Claimant during the hearing why he did not talk to his family doctor about his psychological problems until "recently." The Claimant testified that his doctor referred him to a psychiatrist but he refused the referral.[10] That hearing took place on September 13, 2019, and the General Division issued its decision on September 14, 2019.

[30] In response to a request for his file, the local hospital provided the Claimant with a copy of the screening document. The hospital printed the screening document on October 3, 2019 and the covering letter that the hospital sent the Claimant is dated October 4, 2019. The Claimant first provided this document along with his application for leave to appeal to the Appeal Division in December 2019.

[31] The screening document appears to have been available upon request from the local hospital. The Claimant's psychological conditions formed part of the reason he was applying for a CPP disability pension, and the General Division member asked the Claimant questions about his treatment.

[32] I find that the Claimant could have requested and received the screening document much sooner than he did, and in advance of the General Division hearing.

[33] Given the fact that the Claimant was able to gather other medical documents before his General Division hearing, I see no reason why the Claimant could not have requested and received the document from the local hospital in advance of the General Division hearing in September 2019.

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[10] General Division decision, para 16.

[34] This document was "discoverable" before the General Division hearing, and therefore cannot form the basis for a new facts application at the Appeal Division level either.

Is the new evidence material?

[35] The mental health screening tool that the Claimant wants to rely on is not material – it is not reasonably likely to change the outcome of the Claimant's hearing.

[36] The Claimant argues that the screening tool helps him to clarify four important issues:

1. The intake officer who completed the screening tool was not a "medical practitioner."
2. The intake officer did not refer him to a psychiatrist.
3. The intake officer completed the tool because the Claimant called first to ask for help with his mental health.
4. The fact that the Claimant did not seek medical help earlier is consistent with the pattern that victims of sexual abuse do not usually seek help early enough, which results in irreversible long-term damage.

[37] I am satisfied that if the Appeal Division (or the General Division) were to have considered the screening tool, it is not reasonably likely to have changed the outcome for the Claimant. I will consider each of the Claimant's reasons for wanting to rely on the screening tool.

1. The intake officer who completed the screening tool was not a "medical practitioner"

[38] The General Division concluded that the Claimant did not trust physicians and refused a referral to a psychiatrist. The Claimant seems to argue that the screening tool could show that he did try to access help for mental health conditions in April 2015, and that he started by contacting a person who was not a "medical practitioner."

[39] The Minister argues that the role of the person completing the screening tool is not material. Even if the General Division had this fact wrong, it would have no impact on the outcome of the case for the Claimant. The Appeal Division denied the Claimant permission to appeal because there was no arguable case that the General Division made an error.

[40] In my view, the fact that the Claimant contacted a local hospital for an intake would not be likely to change the General Division's conclusion that the Claimant did not trust medical doctors and that he refused treatment from a psychiatrist. As a result, the fact that he reached out to a non-medical practitioner in an intake is not important enough that it could change the outcome for the Claimant, either at the General Division or at the Appeal Division.

2. The intake officer did not refer him to a psychiatrist

[41] The General Division decided that the Claimant refused a referral to a psychiatrist. The Claimant seems to argue that the screening tool is important because it shows that an intake officer in April 2015 did not refer him to a psychiatrist.

[42] The Minister argues that the screening tool shows that the family doctor referred the Claimant for the screening. This is consistent with the Claimant's testimony. It was the Claimant's family doctor who provided the evidence that the Claimant had been referred to a psychiatrist.

[43] The screening tool states that the Claimant "declined the offer an assessment at the Rapid Access Clinic." In the space for documenting an appointment with a psychiatrist, there is no information completed.

[44] The General Division decided that the Claimant refused a referral to a psychiatrist. The Appeal Division listened to a recording of the General Division hearing and decided that the General Division did not misrepresent the Claimant's testimony. The Claimant testified that the screener would not even book the Claimant an appointment with a psychiatrist if he was not willing to take medication.

[45] In my view, it is not likely that the screening tool would help the Claimant establish that he was not ever referred to a psychiatrist. The document does not state that on its face. The likelihood of inferring that conclusion is low given:

a) the Claimant's testimony at the General Division that confirmed he would not accept a referral to a psychiatrist; and

b) the evidence from his family doctor that the Claimant refused such a referral.

[46] These factors have been considered by both the General Division and the Appeal Division and are unlikely to change as a result of considering the screening tool.

3. The intake officer completed the tool because the Claimant called first to ask for help with his mental health

[47] The Claimant argues that the screening tool shows that he took the initiative to call for an intake in order to get help for his mental health conditions. Given that the General Division decided that the Claimant did not meet his obligation to make even "a basic attempt to get help for his medical condition", the fact that he called for the intake is important.[11]

[48] The Minister argues that the screening tool does not actually confirm that it was the Claimant who made the initial call for the intake. In any event, the question of who took the first step was not at issue for the General Division and would not affect the General Division's decision.

[49] I find that the screening tool does not make it clear who contacted intake first by phone. But even if this fact could be inferred by reviewing the document, I accept the Minister's argument: the question of who initiated contact for the intake is not likely to impact the outcome of the Claimant's case. The General Division's conclusion was that it was not reasonable for the Claimant to refuse to accept a referral to a psychiatrist for treatment. That conclusion is not likely to change based on the level of initiative or cooperation the Claimant showed in an initial mental health screening.

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[11] General Division decision, para 17.

4. **The fact that the Claimant did not seek medical help earlier is consistent with the pattern that victims of sexual abuse do not usually seek help early enough**

[50] The Claimant seems to argue that allowing the Tribunal to consider the screening document helps to show how difficult it is for victims of sexual abuse to seek help early enough.

[51] The Minister argues that the screening tool does not help to establish this fact..

[52] In my view, the document does not explain why the Claimant did not seek help earlier, or why it difficult generally for people to do so. Even if it did help to show how difficult it is to seek help, that does not seem to be an issue that, if it had been better understood by the Appeal Division or the General Division, would have resulted in any difference in the outcome for the Claimant.

[53] A new facts application is not a chance to argue the case all over again. It does not assist a claimant to clarify testimony the Claimant already gave unless the evidence was not discoverable before the hearing and is material to the case.

[54] The new facts application does not provide a path to the Claimant for changing the outcome of the Appeal Division's decision or the General Division's decision. The screening tool was discoverable before the General Division hearing and it is not reasonably likely to impact the outcome of the Claimant's case.

CONCLUSION

[55] I dismiss the Claimant's request to rescind or amend the Appeal Division's decision.

Kate Sellar
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
APPEARANCES:	N. J., self-represented Jordan Fine, Representative for

	the Respondent