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

Citation: *H. Z. v Minister of Employment and Social Development*, 2019 SST 1660

Tribunal File Number: GP-19-1115

BETWEEN:

H. Z.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Date of decision: October 25, 2019

INTRODUCTION

[1] On January 9, 2019, I found that the Applicant was not resident in Canada after November 30, 1997 (the "Original Decision"), for the purposes of the Old Age Security pension. The Original Decision followed a video hearing on January 4, 2019. The Original Decision considered documents and submissions filed by both parties, as well as oral evidence.

[2] The Applicant applied to rescind or amend the Original Decision on July 4, 2019, under section 66 of the *Department of Employment and Social Development Act* (the "DESD Act"). She filed new documents in support of her request. She also filed an appeal of the Original Decision with the Tribunal's Appeal Division. However, until I make a decision on this application, her appeal to the Appeal Division is "on hold".

ISSUES

[3] I can only rescind or amend the original decision under certain conditions. I can only do this if the Applicant presents a new material fact that could not have been discovered at the time of the original hearing with the exercise of reasonable diligence.[1] She must prove that a new material fact exists, and that she could not have discovered that fact at the time of the original hearing by exercising reasonable diligence. She must prove this on a "balance of probabilities". In other words, it must be "more likely than not".

[4] I have to decide these issues:

a) Does the Applicant's evidence prove a new material fact that could not have been discovered at the time of the hearing with the exercise of reasonable diligence?

b) If so, what is the impact on the findings made in the Original Decision?

EVIDENCE FILED IN SUPPORT OF APPLICATION

[5] The Applicant filed the following documents to support her application:

[1] s. 66(1)(b) of the DESD Act.

1. The Affidavit of R. Z., sworn on February 22, 2019 (the "Affidavit");[2]

2. Royal Bank documents and bank book entries from February 15, 2002, to July 25, 2003 (the "Royal Bank Documents");[3]

3. Tenant List (undated) for X;[4]

4. The Applicant's prescriptions from various dates in 1999, 2003, and 2006 (the "Prescriptions");[5] and,

5. Pictures (undated) of Applicant's teeth.[6]

[6] The Applicant also filed a cover letter with the above documents. However, her letter mostly sets out why she disagrees with the Original Decision. Except as specifically set out this decision, her letter does not address the issue before me on this application. The Applicant also filed a letter in response to my written questions about the above documents.[7]

ANALYSIS

Does the evidence prove a new material fact that could not have been discovered at the time of the hearing with the exercise of reasonable diligence?

[7] The test set out in paragraph 66(1)(b) of the DESD Act has three parts.

[8] First, the applicant must present a **new** fact.

[9] Second, the fact must be **material**. A fact is material if it could have affected the outcome of the original hearing.[8]

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[2] RA1-9 to RA1-11
[3] RA1-12 to RA1-16
[4] RA1-17
[5] RA1-18
[6] RA1-19
[7] RA1-6 to RA1-8, and RA4-2 to RA4-3
[8] The Federal Court of Appeal set out this description of "materiality" in a case called *Canada (Attorney General) v Macrae*, 2008 FCA 82. The court decided *Macrae* under s. 84(2) of the *Canada Pension Plan* ("CPP"), which applied to applications to rescind or amend under the CPP, but which has since been repealed. In *Macrae*, the Federal Court of Appeal set out a two-step test for applying subsection 84(2) of the CPP. This test was essentially legislated in paragraph 66(1)(b) of the DESD Act, which came into force in April 2013.

[10] Finally, the fact must **not** have been **discoverable** with the exercise of reasonable diligence. Exercising reasonable diligence means taking the steps that a reasonable person would take to find evidence to support their case. The idea is that a person applying to rescind or amend a decision cannot rely on evidence that they could have presented at the original hearing. As such, an applicant should give evidence of what steps they took before the original hearing, if any, to find evidence to support the fact they are now trying to prove. They should also explain why they could not have presented evidence of that fact at the original hearing.[9]

(1) The Affidavit of R. Z., sworn on February 22, 2019

[11] R. Z. is the Applicant's son. He lives in Florida and swore the Affidavit nearly one-and-a-half months after the Original Decision. The Affidavit deals with property owned by the Applicant in Florida.

[12] I asked the Applicant whether she could have discovered the information (or "facts") contained in the Affidavit before the hearing by the exercise of reasonable diligence, but she did not answer this question.[10] I note that R. Z. could have given evidence at the original hearing, but did not attend. In a persuasive 2005 decision, the Pension Appeals Board held that it could not consider testimony of family members to be "new facts", because such people could have been easily available to testify at the original hearing.[11] The Applicant would also have been aware of the issues addressed in the Affidavit, as the Minister's March 2018 submissions made many references to property owned by her in Florida.[12] The Minister filed those submissions more than nine months before the original hearing date. The Applicant replied to those submissions more than four months before the original hearing date.[13]

[13] I find that if the Applicant had taken reasonable steps before the original hearing, such as speaking to potential witnesses, she could have discovered any new facts supported by the Affidavit. This means she does not meet the third part of the test in s. 66(1)(b) of the DESD Act.

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[9] In *Carepa v Canada (Minister of Social Development)*, 2006 FC 1319, the Federal Court faulted an applicant for not providing (1) evidence of what steps she took before the original hearing to locate evidence she relied on in her application, and (2) an explanation as to why that evidence could not have been presented at the original hearing.
[10] RA0-2 and RA4-2
[11] See the non-binding but persuasive decision in *Minister of Social Development v. Terris*, (2005) CP 22961.
[12] See GD5-9 to GD5-13.
[13] GD7-2.

(2) The Royal Bank Documents

[14] The Royal Bank Documents existed at the time of the hearing. The entries were all more than 15 years old by then. I asked the Applicant whether she could have discovered the information contained in the Royal Bank Documents before the hearing by the exercise of reasonable diligence, but she did not answer this question.[14]

[15] I find that these records should have been in the Applicant's possession, or at least readily accessible by her, before the hearing. As a result, I find that the Applicant could have discovered any facts supported by the Royal Bank Documents through the exercise of reasonable diligence before the hearing. This means she did not meet the third part of the test.

(3) The Tenant List for X

[16] This is a list of tenants for X Avenue in Montréal. I asked the Applicant whether she could have discovered the information contained in the tenant list before the hearing by the exercise of reasonable diligence, but she did not answer this question.[15] Although no date appears on this document, the Applicant said she asked the landlord to include her name on the list as it may have affected the Original Decision.[16] She made that request around the time that she filed this application.[17] This shows that the landlord added her name to the list after the original hearing date: her name would not have been there at the time of the original hearing.

[17] With the tenant list, the "fact" the Applicant wants to show is that she was a named tenant at X Avenue. However, evidence of her tenancy was already in the Tribunal file before the hearing. This evidence included letters from the landlord to the Applicant, as well as a lease naming the Applicant.[18] In her submissions filed before the hearing, she even admitted that having her name on the tenant list was not a real priority to her: she did not think it was important.[19] As a result, I find that she could have discovered any fact supported by the tenant list through the exercise of reasonable diligence before the original hearing. This means she did

[14] RA0-2 and RA4-2
[15] RA0-2 and RA4-2
[16] RA4-2 to RA4-3
[17] RA1-7
[18] GD2-17, GD2-18, and GD7-9
[19] GD7-4

not meet the third part of the test. In addition, the "fact" does not appear to be new: the lease and the landlord's letters already established her tenancy.

(4) The Prescriptions

[18] The Prescriptions existed at the time of the hearing. They were all more than 10 years old by then. I asked the Applicant whether she could have discovered the information contained in the Prescriptions before the hearing by the exercise of reasonable diligence, but she did not answer this question.[20]

[19] I find that the Applicant could have discovered the Prescriptions before the hearing by the exercise of reasonable diligence. These documents should have been in her possession, or at least readily accessible by her. As a result, I find that Applicant could have discovered any facts supported by the Prescriptions through the exercise of reasonable diligence before the hearing. This means she did not meet the third part of the test.

(5) The Pictures of the Applicant's Teeth

[20] It is not clear that the teeth pictures existed at the time of the hearing. I asked the Applicant whether she could have discovered the information shown by the teeth pictures before the hearing by the exercise of reasonable diligence, but she did not answer this question.[21]

[21] By submitting the teeth pictures, the Applicant said she wanted to show that somebody with a "sufficient amount of money" would not have teeth like hers.[22] However, she would have been able to discover this fact before the hearing through reasonable diligence. In fact, she drew attention to her teeth at the hearing.[23] As a result, the teeth pictures do not disclose a fact that could not have been discovered through the exercise of reasonable diligence before the original hearing. This means she did not meet the third part of the test. The "fact" shown by the teeth pictures does not appear to be "new" either, as she mentioned it at the original hearing.

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[20] RA0-2 and RA4-3
[21] RA0-2 and RA4-3
[22] RA4-3
[23] See paragraph 19 of the Original Decision.

Summary of Findings

[22] None of the Applicant's evidence meets the third part of the test under section 66(1)(b). In other words, she failed to show that the facts supported by her evidence could not have been discovered at the time of the original hearing with the exercise of reasonable diligence. In addition, at least two of the facts cannot be considered "new". As a result, I do not need to consider whether all of the facts are new or material. The Applicant must satisfy all three parts of s. 66(1)(b) to be successful.

[23] The Applicant may be disappointed with the outcome of this application. However, the test for rescinding or amending a decision is strict[24], and the evidence she presented does not satisfy that test. She has also filed an appeal of the Original Decision with the Appeal Division, where her concerns with the Original Decision can still be assessed.

What is the impact of any new material facts on the Original Decision?

[24] As I found that the Applicant's evidence did not prove a new material fact that could not have been discovered at the time of the original hearing through the exercise of reasonable diligence, I do not need to answer this question.

CONCLUSION

[25] The Application to Rescind or Amend is dismissed.

Pierre Vanderhout
Member, General Division - Income Security

[24] In *Taker v. Canada (Attorney General)*, 2012 FCA 39, the Federal Court of Appeal referred to the test under s. 84(2) of the *Canada Pension Plan*. That section has since been repealed. However, the judicial interpretation of this provision is essentially the same as the test now legislated in s. 66(1)(b) of the DESD Act.