Citation: *G. P. v. Minister of Employment and Social Development,* 2014 SSTAD 336

Appeal No. AD-13-682

BETWEEN:

G. P.

Applicant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Hazelyn Ross

DATE OF DECISION: November 17, 2014

DECISION

[1] The Application to rescind or amend the Review Tribunal decision is refused. The Application to extend time for Leave to Appeal the Review Tribunal decision is refused.

INTRODUCTION

[2] By a decision issued June 13, 2011, a Review Tribunal determined that the Applicant was not entitled to a *Canada Pension Plan* ("CPP"), disability pension. In its decision, the Review Tribunal concluded that as of his Minimum Qualifying Period, ("MQP"), date of December 31, 2004, the Applicant did not suffer from a severe disability that meets the definition contained in CPP para. 42(2)(a).

[3] On June 26, 2013, the Social Security Tribunal, ("SST"), received an Application for Leave to Appeal the Review Tribunal decision, ("the Application"). While in the correct form, the Application was expressed as a request for reconsideration or leave to appeal or reopen the Review Tribunal decision, pursuant to subsection 66(2) of the *Department of Employment and Social Development Act,* ("the DESD Act"). The Tribunal understands from the way in which the Application is worded that the Applicant is seeking either Leave to Appeal the decision or to have the decision rescinded or amended on the basis of new facts. In fact, during the intervening areas since the Review Tribunal issued its decision, representatives for the Applicant have made several requests either to the Pension Appeals Board, ('PAB'), or to the Office of the Commissioner of Review Tribunals, ("OCRT"), asking for relief in the same terms.

[4] By virtue of the "deeming" provisions contained in ss. 269(2) of the *Jobs, Growth and Long-term Prosperity Act*[1] the decision of the Review Tribunal in respect of the current application(s) is deemed to relate to a decision made by the General Division of the Tribunal.

[1] *Jobs, Growth and Long-term Prosperity Act*

GROUNDS OF THE APPEAL/APPLICATION

[5] In this latest Application, the Applicant's representative submitted that there were new facts relevant to the Applicant's heart condition that warranted the SST either reopening the appeal or rescinding or amending the Review Tribunal decision. The Applicant's representative also contended that given that the Applicant had some thirty-five years of contributions to the CPP, his Application for CPP disability benefits ought not to have been refused.

Preliminary Issues

[6] The following preliminary issues arise in respect of the Application: Is the Application statute barred for,

a) in so far as it purports to be an Application for Leave to Appeal from a decision of a Review Tribunal for being filed outside of the 90 day time limit for filing? and

b) in so far as it purports to be an Application to rescind or amend the Review Tribunal decision is it properly before the Appeal Division of the SST, and if properly before the Appeal Division, is it statute barred for being filed outside of the one year time limit provided in subsection 66(2) of the DESD Act?

The Chronology

[7] The Review Tribunal issued its decision on June 13, 2011.

[8] The Applicant's representative sends a letter, dated September 11, 2011, to the OCRT requesting "a reconsideration or a Section 82 hearing." The OCRT date stamps the letter as received on March 16, 2012.

[9] The file contains a letter dated December 13, 2011 written by Anna Mondano, the Applicant's then representative. The letter is addressed to the PAB and advised the PAB that the Applicant wished to appeal the Review Tribunal decision. And that in the interim, the Applicant's representative has asked the OCRT to reconsider the decision on the basis of new facts. The representative stated that the Review Tribunal decision was attached. Two issues arise in relation to the appeal to the PAB. First, the appeal would have been out of time and

there does not appear to have been an accompanying application to extend the time for filing the appeal As well, the file does not contain a record of whether the PAB did, in fact, receive the Application or of how it disposed of the Application. However, the Tribunal infers from the explanation the Applicant's present representative provided for the late application, that no appeal was actually filed with the PAB.

[10] On May 16th 2012, the OCRT responded to the September 2011 letter advising the Applicant's representative that there was no option to hold a s. 82 hearing with respect to the Review Tribunal decision of June 13, 2011. The letter also advised the representative that jurisdiction now rested with the Pension Appeals Board.

[11] The file also contains a reference to communication of June 24, 2012, that appears to contain a detailed account of the Applicant's health issues. Request for leave to appeal).

[12] Also on file is a letter dated March 20, 2013, addressed to the Office of the Commissioner of Review Tribunals requesting a hearing under CPP s. 84(2) on the basis of new facts. The letter is signed by Anna Mondano in her capacity of representative for the Applicant. The new facts stated are that notwithstanding the vocational rehabilitation the Applicant was receiving at the time of the MQP, he was not employable as he could not perform the required physical tasks. The representative also stated that the Applicant fell and injured his other shoulder in 2006 and that by 2007 he had a heart valve problem.

[13] On June 25, 2013, the Tribunal received a letter from Palma Pallante of Licata Disability Management asking the Tribunal either to reconsider the Review Tribunal decision of June 13, 2011 or to grant a hearing under subsection 66(2) on the basis of new facts. These new facts pertained to the Applicant's heart condition and his then current hospitalisation for open heart surgery. The Applicant's representative attached a summary of his medical history, which the Tribunal has attached to this decision as "Appendix A". It should be noted that this "Medical History" has been annotated by the Applicant's representative. Ms. Pallante also attached a copy of the September 11, 2011 letter in which the same requests had been made.

[14] On July 29, 2013, the Applicants representative, Ms. Pallante filed a new Application with the Tribunal. It is this Application that is currently being considered. The representative again

asked that the Applicant be granted leave to appeal or reconsideration of the decision pursuant to subsection 66(2) of the DESD Act. The representative filed the Application as a late application. The explanation for the late Application was that the "previous representative missed the time line" and further that the Applicant had been "ill for some time and has been in hospital with heart problems."

[15] Note both representatives were attached to the same business, Licata Disability Management.

[16] On October 2, 2013, the SST received updated medical information as well as a letter dated October 02, 2012.

[17] On March 18, 2014 the Applicant's representative sent a request to the SST "to escalate and expedite the Appeal".

THE ISSUES

[18] Two issues arise in relation to this matter. First, with respect to the Application to rescind or amend the Review Tribunal decision of June 13, 2011, provided that the Application is properly before the Appeal Division and is not statute barred, has the Applicant met the test for new facts as described by para. 66(1)(b) of the DESD Act?

[19] Second, with respect to the Application for leave to appeal the Review Tribunal decision of June 13, 2011, provided that the Application is not statute barred, does the appeal have a reasonable chance of success?

[20] For ease of analysis the Tribunal will deal first with the issue of the Application to rescind or amend the Review Tribunal decision and then with the Application for Leave to Appeal.

THE LAW

Rescind or amend

[21] The statutory provisions that currently govern the Tribunal's ability to rescind or amend a decision are found in s. 66 of the DESD Act. The legislative provision provides,

66. Amendment of Decision - **(1)** The Tribunal may rescind or amend a decision given by it in respect of any particular application if

a. In the case of a decision relating to the *Employment Insurance Act*, new facts are presented to the Tribunal or the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact; or

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.

[22] The current legislative provision is not unique in providing for the extra-ordinary step of reconsidering a final decision based upon new facts. Prior to its repeal, ss. 84(2) of *Canada Pension Plan* also provided the same remedy. Ss. 84(2) was framed as,

> 84. (2) 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.

[23] The Federal Court of Appeal interpreted subsection 84(2) in several of its decisions.[2] The Court has very clearly enunciated a two-part test for evidence to be admissible as a "new fact". The evidence must:

a) … establish a fact that existed at the time of the original hearing but was not discoverable before the original hearing by the exercise of due diligence; and

b) the evidence must reasonably be expected to affect the result of the prior hearing.

[24] This two-part test developed by the Federal Court of Appeal is now reproduced in s. 66 of the DESD Act when it refers to "new material fact" discoverable through the exercise of "reasonable diligence". Therefore, the Tribunal must determine if the proposed new evidence submitted with the Application meets the "new material facts" test with regards to a determination of the Applicant's alleged disability as of December 31, 2004.

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[2] *Canada (Attorney General) v. MacRae, [2008] F.C.J. No. 393, at paragraph 16; see also Kent v. Canada (Attorney General), [2004] F.C.J. No. 2083, at paragraphs 33-35; Canada (Minister of Human Resources Development) v. Macdonald, [2002] F.C.J. No. 197, at paragraph 2; Mazzotta v. Canada (Attorney General), [2007] F.C.J. No. 1209, at paragraph 45). Higgins v. Canada (Attorney General)*, 2009 FCA 322, at paragraph 8.

ANALYSIS

Is the Application to rescind or amend the Review Tribunal decision properly before the Appeal Division?

[25] While DESD Act s. 66 allows for the opportunity to rescind or amend a Tribunal decision, it is not an unrestricted opportunity, in that s. 66 also provides a statutory limitation period for the bringing of such applications. Further, the section delimits how the remedy is provided. Thus, ss. 66(2) provides that, "an application to rescind or amend a decision must be made within one year after the day on which the decision is communicated to the Applicant" while ss. 66(4) provides, that "a decision is rescinded or amended by the same Division that made it".

[26] Applying ss. 66(4) and ss. 269(2) of the *Jobs, Growth and Long-term Prosperity Act* to the Applicant's case, the Tribunal finds that consideration of the Application to rescind or amend the Review Tribunal decision is outside the present jurisdiction of the Appeal Division. The Application is not properly before the Appeal Division; it ought to have been brought to the General Division. Accordingly, the Tribunal finds the Application to rescind or amend the Review Tribunal decision fails for lack of jurisdiction. Even if the Appeal Division had this jurisdiction, for the reasons set out below, the Tribunal would have found that the new facts test was not met and would have denied the Application to rescind or amend the decision.

The Application for Leave to Appeal

[27] The applicable statutory provisions governing the grant of leave to appeal a Review Tribunal decision are contained in ss. 56(1), 58(1), 58(2) and 58(3) of the DESD Act. Ss. 56(1) provides, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" while ss. 58(3) mandates that the Appeal Division must either "grant or refuse leave to appeal." Clearly, there is no automatic right of appeal. An Applicant must first seek and obtain leave to bring his or her appeal to the Appeal Division, which must either grant or refuse leave.

[28] Subsection 58(2) of the DESD Act sets out the applicable test for granting leave and provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[29] Ss. 58(1) of the DESD Act sets out the grounds of appeal as being limited to the following:

a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[30] On an Application for Leave to Appeal the hurdle that an Applicant must meet is a first, and lower one than that which must be met on the hearing of the appeal on the merits. However, to be successful, the Applicant must make out some arguable case[3] or show some arguable ground upon which the proposed appeal might succeed. In *St-Louis*[4], Mosley, J. stated that the test for granting a leave application is now well settled. Relying on *Calihoo,*[5] he reiterated that the test is "whether there is some arguable ground on which the appeal might succeed." He also reinforced the stricture against deciding, on a Leave Application, whether or not the appeal could succeed.

ANALYSIS

[31] The Applicant's representative provided two reasons why the Application is out of time, namely the Applicant's illness and error on the part of his previous representative.

[32] DESD Act ss. 57(2) provides the Appeal Division with the power to extend the time for making an application for leave to appeal. However, ss. 57(2) limits any extension of time to a maximum of one year from the date the decision is communicated to the Applicant. The decision in question was communicated to the Applicant on or about June 13, 2011, this being the date the Applicant states he received the Review Tribunal decision. This means that the Applicant had until September 12, 2011 to bring the Application for leave to appeal the decision. There is not mention of an appeal being made until December 2011. The PAB's Rules

[3] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).
[4] *Canada (A.G.) V. St. Louis*, 2011 FC 492
[5] *Calihoo v. Canada (Attorney General),* [2000] FCJ No. 612 TD para 15.

of Procedure provided for an application to extend the time to file an Application for Leave to Appeal. As stated earlier there is no record of an Application to extend the time limit for filing the Application for Leave. Thus, this present Application to extend the time to bring the Application for Leave to Appeal is, therefore, egregiously late coming as it does more than two years after the date the decision was communicated to the Applicant and more than a year later than the maximum date for filing the leave to appeal application.

[33] The Tribunal considered whether natural justice required that it find that the common law doctrine of "special circumstances" applied in this case and pursuant to s. 3 of the SST Regulations to make an order extending the time limit. The Tribunal file shows that the Applicant's representatives have been active in seeking some form of action on his behalf and it could be argued that the steps so taken demonstrate that the Applicant had a continuing intention to pursue the appeal. However, for the following reasons, the Tribunal is of the view that the lateness of the Application cannot be saved by the actions that were taken, neither can it be saved by the "special circumstances" doctrine.

[34] Throughout these proceedings the Applicant has been represented by one entity, namely, Licata Disability Management. The individual representatives may have changed, but the Applicant was always represented by the same business. While it is not the Tribunal's intention to penalise the Applicant for the missteps of his representative(s), the Tribunal finds that if the deadline to file the appeal was missed it is Licata Disability Management that missed the deadline and the claim that the late filing was due to the fault of a previous representative cannot, therefore, be sustained.

[35] Further, the various communications as well as the present Application demonstrate that what is at the heart of the various applications is really the Applicant's disagreement with the outcome of the Review Tribunal hearing. Nothing new was raised in any of the communication. The Applicant's pre-hearing medical history included heart problems for which he underwent surgery. At paragraph 22 of the decision, the Review Tribunal referenced the fact that in July 2007, the Applicant underwent replacement surgery of the ascending aorta due to aneurism. In 2013, the Applicant's representative states that he had a heart valve problem. The Tribunal

finds that this medical condition is not a new material fact that could have affected the outcome of the Review Tribunal decision as it is far too remote from the Applicant's MQP.

[36] Further, it is clear that the Review Tribunal considered the Applicant's capacity to pursue regularly any substantially gainful employment in the context of the training he undertook though WSIB. The Applicant had a full opportunity at the hearing to explain his difficulties, if any, during this training. If he did not do so at the hearing, this cannot now ground an appeal.

[37] In the Tribunal's view, the matters raised by the Applicant's representatives in their various communications demonstrate only disagreement with the outcome of the hearing before the Review Tribunal. Disagreement with the decision is not a ground of appeal. The Applicant's representatives have not shown that the Review Tribunal either failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction or that Review Tribunal erred in law in making its decision, whether or not the error appears on the face of the record. Similarly, the Applicant's representative has not shown that the Review Tribunal based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[38] Furthermore, the Tribunal is not persuaded that, after a delay of more than two years, the Respondent would not be prejudiced if the Tribunal were to extend the time for filing the Application for Leave to Appeal. At the very least the Respondent would reasonably have expected finality in this matter after this length of time. Accordingly, taking all of the above into consideration the Tribunal finds that this is not an appropriate case in which to extend the time limit for filing an Application for Leave to Appeal.

CONCLUSION

[39] The Application to extend the time limit to file an Application for Leave to Appeal the Review Tribunal decision is refused.

Hazelyn Ross
Member, Appeal Division