Citation: *P. M. v. Minister of Employment and Social Development,* 2014 SSTAD 355

Appeal No: AD-14-427

BETWEEN:

P. M.

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: VALERIE HAZLETT PARKER

DATE OF DECISION: December 10, 2014

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal is granted.

INTRODUCTION

[2] The Applicant applied for a *Canada Pension Plan* disability pension a number of years ago. He appealed the denial of this application to a Review Tribunal. In 2004 the Review Tribunal dismissed his appeal.

[3] The Applicant took no further steps to advance his claim until October 2012 when he sought to have his claim rescinded or amended based on the presentation of new facts. At that time, the procedure for such a claim was governed by subsection 84(2) of the *Canada Pension Plan*. This was changed by the *Jobs, Growth and Long-term Prosperity Act*. This legislation repealed section 84(2) of the *Canada Pension Plan* and provided that any such claims that had not been decided before April 1, 2013were deemed to be applications made under section 66 of the *Department of Employment and Social Development Act* (DESD Act). As no decision had been made on the Applicant's new facts claim, it was deemed to have been made on April 1, 2013.

[4] The DESD Act also provides that an application to have a prior decision rescinded or amended based on new facts must be made within one year of when the original decision was communicated to the Applicant. The General Division of this Tribunal dismissed the Applicant's request for rescission or amendment of the Review Tribunal decision because the application was made more than one year after the Review Tribunal decision was communicated to him.

[5] The Applicant seeks leave to appeal the General Division decision on three basic grounds: that the General Division erred in law in concluding that his claim was statute-barred as a result of the change in the legislation, that it erred in finding that the documents purported to be new facts did not meet the legal test for this, and that the General Division breached principles of natural justice by preferring some medical reports over others as this determination should have been made based on credibility of the authors.

[6] The Respondent argued that the application for leave to appeal should be dismissed because it is statute-barred and that the legal test for new facts has not been met. The General Division made no errors in this regard. In addition, the Respondent submitted that the Applicant did not properly raise any argument regarding a breach of natural justice.

[7] Prior to granting the decision herein, I requested written submissions from both parties. The time to deliver submissions was extended twice at the request of the Respondent. The Respondent filed lengthy submissions on the issues. The Applicant filed no submissions. I have considered the Application for Leave to Appeal and the Respondent's submissions in making the decision in this matter.

ISSUES AND ANALYSIS

[8] In order to be granted leave to appeal, the Applicant must present some arguable ground upon which the proposed appeal might succeed: *Kerth v. Canada (Minister of Development)*, [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has also found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success*: Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, *Fancy v. v. Canada (Attorney General)*, 2010 FCA 63.

[9] Section 58 of the *Department of Employment and Social Development Act* (DESD Act) sets out the only grounds of appeal that can be considered to grant leave to appeal from a decision of the General Division. They are if the General Division made an error in law, made an error in fact in a perverse or capricious manner or without regard to the material before it, or breached the principles of natural justice (see Appendix for statutory provisions).

Is the Application Statute-Barred?

[10] Section 58 of the DESD Act states that one ground of appeal is that General Division made an error of law. In this case, the Applicant argued that the General Division did this by interpreting section 66 of the DESD Act to have retroactive effect, such that his claim, which was made prior to April 1, 2013 but not decided by then, was barred from proceeding.

He argued, based on a decision of the Supreme Court of Canada, that legislative powers are not designed to take away rights that a party had prior to the introduction of new legislation. The Respondent countered this argument, relying on an extensive body of case law and scholarly writings regarding the interpretation of legislation. It argued that the intent of the legislature was clear, and that although harsh, the DESD Act had retroactive effect that terminated the Applicant's right to a reconsideration of the Review Tribunal decision. Therefore, the General Division made no error in law.

[11] I find that the law on this issue is not clear. Counsel have pointed me to decisions of the Supreme Court of Canada, Courts of Appeal and scholarly writings. All these sources confirm that if the legislation is clear and terminates prior rights, it must be accepted. That, however, is not the end of the inquiry. The common law doctrine of special circumstances may apply to this case, although that is not certain. It is also not clear whether it is appropriate, in this case, for the Applicant's rights to be terminated or taken beyond his control by the introduction of new legislation. Hence, I must conclude that this ground of appeal has a reasonable chance of success on appeal.

Does the Evidence Meet the Test for New Facts?

[12] The Applicant also argued that the reports he presented as new facts met this legal test, and that the General Division erred in concluding that it did not, which error falls within section 58 of the DESD Act. His argument is based on his disagreement with the weight that the General Division gave to the various medical reports that were before it. With this, the Applicant essentially asks this Tribunal to reevaluate and reweigh the evidence that was presented to the General Division. This is the province of the trier of fact. The tribunal deciding whether to grant leave to appeal ought not to substitute its view of the persuasive value of the evidence for that of the prior decision maker – *Simpson v. Canada (Attorney General),* 2012 FCA 82. This argument is not a ground of appeal that may have a reasonable chance of success as it does not point to an error made by the General Division.

[13] The Applicant also argued that the new evidence provided a different medical diagnosis. This alone is insufficient to meet the legal test for new facts. It is not the diagnosis of a condition, but its effect on the Applicant's ability to work that is relevant to a

disability determination. Therefore, this argument is not a ground of appeal that may have a reasonable chance of success on appeal.

[14] Further, the Applicant argued that he would provide further evidence from his medical practitioners to support his claim at a hearing. The promise of new evidence is not a ground of appeal that can be considered under section 58 of the DESD Act. Therefore, this argument does not have a reasonable chance of success on appeal.

Was Natural Justice Breached?

[15] Lastly, the Appellant argued that principles of natural justice were breached as credibility should be the only factor considered to determine which medical reports should be given greater weight. The Respondent contended that this did not properly raise any issues regarding natural justice. A breach of natural justice is a ground of appeal that can be considered under section 58 of the DESD Act. I am not persuaded, however, that the Applicant has pointed to a breach of natural justice by the General Division. As stated above, it is for the General Division, as the trier of fact, to give weight to evidence presented and to reach a conclusion after assessing and weighing the evidence. The fact that the General Division did so in no way indicates a breach of natural justice. Therefore this argument does not present any ground of appeal that may have a reasonable chance of success on appeal.

CONCLUSION

[16] Leave to appeal is granted as the Applicant has put forward at least one argument that may have a reasonable chance of success on appeal.

[17] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

58. (1) The only grounds of appeal are that

> (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.

66. (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.

Jobs, Growth and Long-term Prosperity Act

261. (1) If no decision has been made before April 1, 2013, in respect of a request made under subsection 84(2) of the *Canada Pension Plan*, as it read immediately before the coming into force of section 229, it is deemed to be an application made on April 1, 2013 under section 66 of the *Department of Human Resources and Skills Development Act* [now the *Department of Employment and Social Development Act*] and is deemed to relate to a decision made, as the case may be, by

> (a) the General Division of the Social Security Tribunal, in the case of a decision made by a Review Tribunal; or
>
> (b) the Appeal Division of the Social Security Tribunal, in the case of a decision made by the Pension Appeals Board.