Citation: *B. K. v. Minister of Employment and Social Development*, 2015 SSTAD 1022

Appeal No. AD-15-512

BETWEEN:

B. K.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Rescind or Amend Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: August 27, 2015

REASONS AND DECISION

INTRODUCTION

[1] This is an application to rescind or amend the decision of the Appeal Division rendered by me on January 13, 2015. I refused the Applicant's application for leave to appeal the decision of the Review Tribunal, as I was not satisfied that the appeal had a reasonable chance of success.

[2] The Applicant filed this rescind or amend application with the Social Security Tribunal on July 10, 2015. To succeed on this application, the Applicant must meet the provisions set out in section 66 of the *Department of Employment and Social Development Act* (DESDA).

ISSUE

[3] Has the Applicant met the provisions set out in section 66 of the DESDA?

BACKGROUND AND HISTORY OF PROCEEDINGS

[4] A brief background would be helpful.

[5] The Applicant filed an application for a Canada Pension Plan disability pension on August 7, 2009. The Respondent denied the application, initially on December 1, 2009 and again on reconsideration on July 28, 2010.

[6] The Applicant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals on October 27, 2010. A hearing before a Canada Pension Plan Review Tribunal was scheduled for September 21, 2011 but it was adjourned to October 25, 2011, to enable the Applicant's wife to attend the proceedings. The second hearing was also adjourned, for reasons that are not clear on the record.

[7] A third hearing before a Canada Pension Plan Review Tribunal was scheduled for and proceeded on November 20, 2012. The Review Tribunal rendered its decision on January 11, 2013. The Review Tribunal found that the available medical evidence was

insufficient to support a finding that the Applicant's Crohn's disease, cardiac condition, or back pain left him incapable regularly of pursuing any substantially gainful occupation prior to his minimum qualifying period of December 31, 2008. As the Review Tribunal found that the Applicant was not disabled under the *Canada Pension Plan*, and that he was not entitled to a disability pension, it dismissed his appeal.

[8] The Applicant filed an application requesting leave to appeal the decision of the Review Tribunal with the Pension Appeals Board on April 10, 2013. The application was dated April 7, 2013 and ought to have been filed with the Appeal Division of the Social Security Tribunal. Under section 256 of the *Jobs, Growth and Long-Term Prosperity Act* (JGLTPA), an appeal from a decision of a Review Tribunal that could have been appealed to the Pension Appeals Board, but for the repeal of subsection 83(1) of the *Canada Pension Plan* by section 229 of the JGLTPA, may be brought to the Appeal Division of the Social Security Tribunal.

[9] In late February 2014, the Social Security Tribunal notified the Applicant that he had filed an incomplete application requesting leave. As he did not respond, the Social Security Tribunal wrote to the Applicant again in June 2014, advising him that as it had not received the information needed to complete the appeal, it had closed its file. Ultimately, the Social Security Tribunal re-opened the matter, due to "special circumstances occasioned by the delay in acknowledging the receipt of the application". On September 5, 2014, the Social Security Tribunal advised the Applicant that his complete Application Requesting Leave to Appeal was deemed to have been filed on April 7, 2013 (although it was in fact filed on April 10, 2013 with the Pension Appeals Board).

[10] The Applicant sought leave on the grounds that he disagreed with the decision of the Review Tribunal. He noted that his disabilities and illnesses were so severe that he did not and could not leave the house except for brief periods, to obtain therapy. In his leave application filed on April 10, 2013, the Applicant advised that he required three to six months to collect detailed medical records, to show that his various illnesses were present on or before his minimum qualifying period of December 31, 2008 and continued to be present and severe. He

also advised that he was scheduled for additional medical procedures and tests. He sought additional time to produce these records.

[11] In my decision of January 13, 2015, I addressed the Applicant's proposal to produce various medical records to support his disability claim. I refused the request for leave to appeal. I wrote:

> **New Facts**
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> [12] Finally, the Applicant indicated that he would be producing various medical records to support his disability claim. The proposed additional records should relate to the grounds of appeal. The Applicant has not indicated how the proposed additional records might fall into or relate to one of the enumerated grounds of appeal. If the Applicant is requesting that we consider these additional medical records, re-weigh the evidence and re-assess the claim in his favour, I am unable to do so at this juncture, given the constraints of subsection 58(1) of the DESDA. Neither the leave application nor the appeal provides any opportunities to re-hear the merits of the matter.
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> [13] If the Applicant intends to file the additional medical records in an effort to rescind or amend the decision of the Review Tribunal, he must now comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and must also file an application for rescission or amendment with the same Division that made the decision. There are strict deadlines and requirements that must be met to succeed in an application for rescinding or amending a decision. Subsection 66(2) of the DESDA requires an application to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party. In this particular instance, the Applicant was required to have made an application to rescind or amend within one year of having received the decision of the Review Tribunal issued on January 11, 2013. He is now well out of time.
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> [14] Paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that the new fact is material and that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence. The Appeal Division in this case has no jurisdiction to rescind or amend a decision based on new facts, as it is only the Division which made the decision which is empowered to do so.
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> [15] Even if the Applicant was not time barred from making an application to rescind or amend, it strikes me that the records which he proposes to file likely would not constitute new facts under section 66 of the DESDA. The records likely were available and could have been discovered prior to the Review Tribunal hearing, with the exercise of reasonable diligence.
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> [16] This is not a re-hearing of the merits of the claim. In short, there are no grounds upon which I can consider any additional medical records for the purposes of a leave

application or appeal, notwithstanding how supportive the Applicant regards them to be in his claim for disability benefits.

[12] In mid-May 2015, the Applicant contacted the Social Security Tribunal and enquired about the status of his application for leave to appeal. The Social Security Tribunal confirmed that a copy of the leave decision had been sent to the Applicant in January 2015. The Applicant had however moved, so did not receive it. The Social Security Tribunal re-sent a copy of my decision to him in May 2015.

[13] In early June 2015, the Applicant contacted the Social Security Tribunal and was advised that he could pursue judicial review of my decision with the Federal Court of Canada. On June 10, 2015, the Applicant wrote to the Social Security Tribunal that he understood that the "main contributing factors for the refusal of [his] appeal was due to a lack of a sufficient health record documentation supporting the case". The Applicant advised that he had in fact provided copies of medical reports when he filed the application requesting leave to appeal, but was nonetheless providing additional copies, along with a completed Application to Rescind or Amend. The Applicant concluded that he would greatly appreciate it if the file were reviewed once more.

[14] Section C of the Application to Rescind or Amend stipulates that applicants attach any documents relied on as evidence of the new factors or new material. Applicants are instructed to list only the new evidence. The Applicant did not provide a description of any new documents and simply wrote "2002 to 2012". He indicated that there were 300 pages of evidence, although he did not number the pages. The Social Security Tribunal numbered and counted the pages, including the Application to Rescind or Amend, as totalling 232 pages.

[15] Much of the 232 pages of the Application to Rescind or Amend consisted of medical records, and from what I can determine, most or all of these records largely duplicated those that had been before the Review Tribunal. These records spanned the period from June 18, 2002 to May 6, 2012. It would have indeed been helpful had the Applicant identified which of these records were "new" and had not been previously provided to the Social Security Tribunal for consideration at the leave stage.

[16] At first glance, it seems that the report dated October 12, 2011 of Dr. Conrad Keebler (at RA1-6 to RA1-7) might not have been before the Review Tribunal and certainly, the Review Tribunal did not refer to a report of that date it in its decision, but an inspection of an undated report of Dr. Keebler (Exhibit A-7 at page 28 of 260 pages of the hearing file before the Review Tribunal) indicates that the letters are the same, other than for the missing date.

[17] There are two consultation reports of Dr. Shahzad S. Karim that are identical in content, although they bear two separate dates, of September 22, 2008 and October 22, 2008. Although I did not previously have a copy of Dr. Karim's October 22, 2008 report before me, I do not consider it "new" as it duplicates his earlier report of September 22, 2008.

NEW FACTS

[18] I have identified the below documents, as "new" in the sense that copies do not appear to have been before me previously, when I considered the application requesting leave to appeal. For that matter, these same documents do not appear to have been before the Review Tribunal.

1. History and Physical Examination Report dated February 16, 2010 by Dr. Keebler (RA1-57 and RA1-58);

2. E.C.G. dated February 16, 2011 (RA1-59);

3. Consultation report dated September 21, 2010 prepared by Dr. Keebler (RA1-60);

4. Providence Health Care Heart Centre Initial Consultation (undated) (RA1- 65 to RA1-68);

5. Signature page to Catheterization and Angioplasty Report dated July 30, 2010 (RA1-70); and

6. Medical Certificate dated August 2, 2006 prepared by Dr. Sartekin (RA1- 200).

[19] There are various laboratory results which may also be "new" and may not have been before me when I considered the application requesting leave to appeal, but I have not considered them, as they do not provide any opinions.

SUBMISSIONS

[20] The Applicant submits that,

> As stated in the decision letter received from the Tribunal there was some missing back up health records documentation that have not been received by the Tribunal that have played a major role in their decision-making.

[21] The Respondent has not filed any written submissions in respect of the application to rescind or amend.

THE LAW

[22] Section 66 of the DESDA states:

> Amendment of decision
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> **66.** (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if
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> (*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
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> **(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.**
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> (2) An application to rescind or amend a decision must be made within one year after the day on which a decision is communicated to the appellant.
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> (3) Each person who is the subject of a decision may make only one application to rescind or amend that decision.
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> **(4) A decision is rescinded or amended by the same Division that made it.**
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> (My emphasis)

ANALYSIS

[23] The Applicant appears to be requesting that I either rescind or amend the decision of the Review Tribunal issued on January 11, 2013. However, under subsection 66(4) of the DESDA, my powers are constrained, as I am limited to either rescinding or amending my leave decision of January 13, 2015. I do not have any authority or jurisdiction to rescind or amend the decision of the Review Tribunal issued on January 11, 2013. That being so, if I am satisfied that the Applicant meets the requirements of section 66 of the DESDA, at most, I can only rescind or amend the leave decision which I made previously.

[24] I need to be satisfied that the new material facts that are presented could not have been discovered at the time of the hearing with the exercise of reasonable diligence. This involves determining whether:

(a) There is a new material fact, i.e. the evidence must reasonably be expected to affect the result of the prior hearing (the "materiality" test); and

(b) The new fact could not have been discovered at the time of the original hearing with the exercise of due diligence (the "discoverability" test)

[25] In this case, the prior or original hearing refers to the proceedings before me in the application for leave to appeal.

[26] The Applicant has not explained how any of the "new" facts which I have identified above in paragraph 18 meet either the materiality or discoverability tests.

[27] Even if I should assume that the Applicant did not have copies of these "new" records when he made the application for leave to appeal, I note that these records all pre- date the Application Requesting Leave to Appeal, which was filed on April 10, 2013. He does not explain how these "new" records could not have been discovered at the time of the application for leave to appeal with the exercise of due diligence. The Applicant has not indicated when and what efforts he might have undertaken to obtain these "new" records, though the cover letter accompanying his Application to Rescind or Amend suggests that the Applicant in fact had

them previously and had provided copies to the Social Security Tribunal or Office of Commissioner of Review Tribunals.

[28] More importantly, the Applicant has not shown how the "new facts" can reasonably be expected to affect the result of the prior hearing. As I indicated in the leave decision, any "new facts" should relate to the grounds of appeal under subsection 58(1) of the DESDA, namely, that:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[29] For our purposes, a decision of the Review Tribunal is considered to be a decision of the General Division.

[30] Even if I had accepted that these "new" facts or records met the "discoverability" component under section 66 of the DESDA, the Applicant has not indicated how these "new" facts or records fall into or relate to one of the enumerated grounds of appeal under subsection 58(1) of the DESDA. It is not evident as to how any of the "new" facts or records might show or support any allegation that the Review Tribunal failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; that the Review Tribunal erred in law in making its decision, whether or not the error appears on the face of the record; or 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.

[31] Again, I must reiterate that if the Applicant is requesting that we reconsider these "new" facts or records, re-weigh the evidence and re-assess the claim to a disability pension in his

favour, I am unable to do so at this juncture, given the constraints and limitations of subsection 58(1) of the DESDA. This is not a re-hearing of the merits of the claim to a disability pension.

[32] Finally, even if these "new" facts or records met the "materiality" and "discoverability" requirements under section 66 of the DESDA, and even if I were somehow permitted to rescind or amend the decision of the Review Tribunal, these "new" facts or records fall far short in establishing severity as defined by the *Canada Pension Plan.* The History and Physical Examination Report does not address the severity of any symptoms, nor discuss any limitations or restrictions caused by the Applicant's disabilities. The E.C.G. is noted to be normal. The copy of the consultation report dated September 21, 2010 of Dr. Keebler is incomplete and does not provide a prognosis. Dr. Keebler saw the Applicant subsequently and prepared consultation reports dated March 31, 2011 (RA1-8 to RA1-9) and October 12, 2011 (RA1-6 to RA1-7). In any event, these opinions were prepared long after the minimum qualifying period, so likely would not have established the severity of the Applicant's disability by his minimum qualifying period. As for the Providence Health Care Heart Centre Initial Consultation, it would have been premature to base any severity decisions on an initial consultation. The signature page to a medical report is of no consequence to any severity considerations, and the Medical Certificate, which is a note excusing the Applicant from work, contains very little information to enable one to assess severity. All in all, I do not see that anything turns on these "new" facts or records.

CONCLUSION

[33] The Application to Rescind or Amend my leave decision is refused.

Janet Lew
Member, Appeal Division