Citation: ***C. G. v. Minister of Employment and Social Development*****, 2015 SSTAD 1346**

Date: November 20, 2015

File number: AD-15-1039

APPEAL DIVISION

Between:

C. G.

Applicant

and

Minister of Employment and Social Development

Respondent

Leave to Appeal

Decision by: Hazelyn Ross, Member, Appeal Division

DECISION

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

INTRODUCTION

[2] On May 4, 2012 a Review Tribunal denied the Applicant's appeal of a reconsideration decision that denied her a *Canada Pension Plan* (CPP) disability pension. On November 26, 2014 the Applicant filed an application to rescind or amend the Review Tribunal decision on the basis that she had new facts in the form of a medical report to present to the Tribunal. On June 10, 2015 a Member of the General Division of the Tribunal issued her decision denying the application.

[3] The General Division Member dismissed the application on the basis that it had been filed outside of the one year time limit established by subsection 66(2) of the *Department of Employment and Social Development* (DESD) *Act*. In the alternative, the Applicant had not presented a new material fact as required by subsection 66(1)(b) of the DESD Act.[1] The Applicant seeks leave to appeal the General Division decision.

GROUNDS OF THE APPLICATION

[4] The Applicant submits that the General Division failed to consider a vital medical report in which she was described as being unable to work. This report was provided by a neurologist, Dr. Leckey. The Applicant did not specify the ground of appeal, however, the Appeal Division was able to deduce from her submissions that the Applicant grounds her appeal on subsection Section 58 (1)(c) of the DESD Act, namely that the General Division decision is based on an erroneous finding of fact.

[5] The Applicant made no submissions on whether her application to rescind or amend the Review Tribunal decision was statute-barred.

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

> 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.

THE ISSUE

[6] The Tribunal must decide if the Appeal has a reasonable chance of success.

THE GOVERNING LAW

Leave to Appeal a decision of the General Division

[7] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.[2] To grant leave, the Appeal Division must be satisfied that the appeal would have a reasonable chance of success.[3] In *Canada (Minister of Human Resources Development) v. Hogervorst (2007), 2007 FCA 41* as well as in *Fancy v. Canada (Attorney General),* 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case.

[8] There are only three grounds on which an appellant may bring an appeal. These grounds are set out in s. 58 of the *Department of Employment and Social Development* (DESD) *Act*. They are that either there has been a breach of natural justice; or the General Division erred in law; or based its decision on an error of fact made in a perverse or capricious manner or without regard for the material before it.[4]

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[2] Sections 56 to 59 of the DESD Act. Subsections 56(1) and 58(3) govern the grant of leave to appeal, providing that "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[3] The DESD Act, subsection 58(2) sets out the criteria on which leave to appeal is granted, namely, "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[4] **58(1) Grounds of Appeal** –

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.

Rescind or Amend

[9] The law in respect of the Tribunal's ability to rescind or amend a decision is set out at section 66 of the governing DESD Act. The section provides that:

> **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.
>
> **(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.
>
> **(3)** Each person who is the subject of a decision may make only one application to rescind or amend that decision.
>
> **(4)** A decision is rescinded or amended by the same Division that made it.

ANALYSIS

[10] The Applicant submits that the General Division has erred in fact. She argues that the General Division decision did not take into account Dr. Lecky's letter, which the Applicant contended was a new, material fact. The Applicant's submissions gave rise to two questions, which in the view of the Appeal Division combine to answer the question of whether the appeal would have a reasonable chance of success. These questions are:

a. Was the letter a new, material fact?
b. Did the General Division make its decision without regard for the material before it?
c. Was the application to rescind or amend the Review Tribunal decision statute- barred?

It is convenient for the Appeal Division to address the questions in this order.

The status of the letter

[11] The letter is actually a two-page medical report (the letter) dated October 29, 2013. (RA2: 2-3). For the General Division to find that the Letter was a new material fact, the Letter had to meet the two-pronged test set out at subsection 66(1), namely, that

a) the facts presented could not have been discovered at the time of the hearing (discoverability); and
b) the facts must be material to the decision (materiality).

[12] Discoverability goes to the point that the proposed new fact is a fact that existed at the time of the original hearing but that it was not discoverable before the original hearing by the exercise of due diligence. Materiality goes to how relevant the proposed new fact likely was to the result of the prior proceeding.

[13] The General Division found that the letter could not constitute a new material fact because while it was not available prior to the Review Tribunal hearing and, therefore, not discoverable, it presented no new material fact. The Appeal Division agrees. The letter is clearly dated well after the Review Tribunal. On this basis alone, there is a possibility that it could meet the discoverability test. However, the Letter does not meet the materiality test in that it discloses nothing that was not known to the Review Tribunal when it made its decision.

[14] Dr. Leckey, who actually appeared as a witness at the Review Tribunal Hearing, repeated much of the same evidence that he provided at the hearing in the letter. The main difference between his oral testimony and the written report was his statement in the report that no further investigations were planned for the Applicant. Most, if not all of the evidence concerning the Applicant's medical conditions; her consultation history; as well as her treatment history was before the Review Tribunal. The General Division found that any additional information was not significant and therefore, the letter contained no evidence that was material to the Review Tribunal decision. The Appeal Division finds no error on the part of the General Division in this regard.

[15] In coming to this conclusion the Appeal Division also answers the question whether the General Division made its decision without regard for the material before it in the negative.

Was the application to rescind or amend the Review Tribunal decision statute-barred?

[16] As noted earlier, the Applicant did not make any submissions on this point. Nonetheless, the Appeal Division chooses to address this aspect of the General Division decision to dismiss

the appeal. The Tribunal received the Application to rescind or amend the Review Tribunal decision on November 26, 2014. At this point, under the transitional provisions, all of the files that had been transferred from the Review Tribunal had been deemed as having been filed on April 1, 2013. Had the Applicant filed an application to rescind or amend with the Review Tribunal before April 1 2013, she would have had up to a further year to file the letter. However, her application was not made until almost seven months had passed after the expiry of the one-year time limit.

[17] The Applicant states that she was confused as to how to file the "new" information. The General Division found this understandable, but pointed out that the Applicant's explanation was not one that was permissible under the DESD Act, stating:

> 11] While I understand that the Applicant may not have known how to file the Application, the Act does not permit any extension of this time limit for that reason. Therefore, this Application must be dismissed.

The Appeal Division agrees with the General Division's statement of the legal position.

[18] In light of the above, the Appeal Division finds that the General Division did not base its decision on erroneous findings of fact that it made perversely or capriciously or without regard for the material before it. Accordingly, the Appeal Division is not satisfied that the appeal would have a reasonable chance of success.

CONCLUSION

[19] The Application is refused.

Hazelyn Ross
Member, Appeal Division