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

Citation: *K. V. v. Minister of Employment and Social Development,* 2016 SSTADIS 113

Date: March 10, 2016

File number: AD-15-1136

APPEAL DIVISION

Between:

K. V.

Applicant

and

Minister of Employment and Social Development

Respondent

Rescind or Amend

Decision by: Hazelyn Ross, Member, Appeal Division

Canada

DECISION

[1] The Appeal Division refuses to rescind or amend its decision of August 31, 2015 refusing the Application for leave to appeal.

INTRODUCTION

[2] The Applicant applies to the Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), to rescind or amend its decision August 31, 2015 which refused the Applicant leave to appeal the decision of the General Division of the Tribunal dated April 20, 2015.

GROUNDS OF THE APPLICATION

[3] The Applicant submitted that there is new evidence that warrants the Appeal Division rescinding or amending its decision refusing leave to appeal.

PRELIMINARY ISSUE

[4] At the request of the Respondent, the Appeal Division held a pre-hearing conference. It was intended that the pre-hearing conference would allow the parties to narrow the issues in the matter. Counsel for the Respondent wanted to know whether the Applicant was challenging the Appeal Division decision refusing leave to appeal or whether he was challenging the General Division decision. The Applicant spent considerable time outlining how, in his opinion, the various decision-makers had come to the wrong conclusion about his ability to pursue regularly any substantially gainful occupation.

[5] At the end of the lengthy, pre-hearing conference the Appeal Division gave the Applicant seven days in which to advise it which of the two decisions he was challenging as this had not been clarified.

[6] The Appeal Division advised the Applicant that if he did not send his direction in by the end of the time allotted, it would render a decision. The pre-hearing conference was held on Thursday, February 25, 2016. The Appellant had until Thursday March 3, 2016 to advise the Appeal Division of his election. At the time of writing the Appeal Division had received

no further communication from the Applicant. Therefore, the Appeal Division renders this decision under the terms of the agreement reached with the Applicant at the pre-hearing conference

ISSUE

[7] The Appeal Division must decide if the Application satisfies the test for new material facts set out in subsection 66(1) of the *Department of Employment and Social Development Act*, (the DESD), namely,

> Do the information and documents presented by the Applicant constitute new material facts that could not have been discovered with the exercise of reasonable diligence at the time the Appeal Division rendered its decision refusing leave to appeal the General Division decision?

APPLICABLE LAW

Rescind or Amend

[8] The applicable statutory provision 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.

[9] To succeed on an application to rescind or amend a decision, an applicant must establish that the "new evidence" being proffered is both evidence that was not discoverable, with the exercise of reasonable diligence, prior to the hearing in respect of which the Application issues; and evidence that was material to the outcome of the decision

[10] Discoverability goes to the timing of the existence of the proposed "new fact". A new fact will be material if it can be shown that it could reasonably be expected to have affected the outcome of the decision.

ANALYSIS

[11] Pursuant to subsection 66 (4) the Appeal Division can only consider its decision of August 31, 2015 in which it refused the Applicant leave to appeal the decision of the General Division.

[12] The Applicant submitted his Application to rescind or amend on October 16, 2015. In addition to reiterating his position that he is entitled to greater retroactivity of the Canada Pension Plan disability pension than that which he had been awarded. The General Division had determined that the Applicant had become disabled in November 2009 and that payment of the disability pension would commence as of March 2010. These dates are entirely dependent upon the statutory provisions that govern payment of a disability pension. The date the application for the disability pension is received is the date that determines when payment of a disability pension will start.[1] The General Division noted that, "the application was received in February 2011; therefore the Appellant is deemed disabled in November 2009. According to section 69 of the CPP, payments start four months after the deemed date of disability. Payments will start as of March 2010."

The documents submitted to support the Application

[13] The Applicant has contended and continues to contend that the disability payments should commence as of March 1997. To support his present Application, the Applicant submitted the following items:

a) A letter from Dr. Rhonda King dated January 19, 2015;
b) A copy of a report from Dr. David Ruggles, dated September 30, 1996;
c) A medical report authored by Dr. Sudhir Amba date October 4, 2011;
d) A psychologist report from Dr. Robert Heaman dated June 8, 2011. This report is addressed to the Workplace Safety and Insurance Board;

[1] CPP section 69

e) A handwritten statement from the Applicant setting out his interaction with CPP in 1996 regarding whether he could engage in part-time work;
f) An impairment Evaluation form, which is a review of the Applicant's medical file for the period April 1, 1988 to June 26, 1996;
g) Copy of a disability suspension request dated August 29, 1996;
h) A copy of a letter from Dr. Ruggles dated November 15, 1996 addressed to the Human Resources Development, Income Security Programmes; which letter indicated that in 1996, Dr. Ruggles noted the presence of arthritic changes in the Applicant's shoulder; and
i) A copy of a letter dated September 30, 1996, also authored by Dr. Ruggles, which letter offers a more extensive review of the Applicant's medical conditions.

[14] The Appeal Division was faced with the question of whether in relation to its earlier decision of August 30, 2015 the Applicant has put forward any mew material fact that could not have been discovered with the exercise of reasonable diligence? For the reasons that follow, the Appeal Division finds that he has not done so.

[15] Without exception none of these documents can be seen as new evidence. All of the documents had been presented at the General Division hearing. In fact, the General Division Member discussed them and their contents extensively in her decision. They are, therefore, not new material facts that could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Accordingly, the documents do not meet the discoverability test set out in subsection 66 (1)(b) of the DESD Act, which is the first hurdle for any proposed new evidence. Accordingly, the Application must fail. In any event the crucial question raised in the application for leave to appeal related to whether the Applicant could derive benefit from the application of the reinstatement provisions. As set out in the Leave to Appeal decision, he could not.[2]

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[2] The Applicant submitted that he was entitled to have his CPP disability pension automatically reinstated because he became disabled shortly after he attempted to return to the workforce in 1997. Under CPP subsection 70.1 a person whose disability payments were stopped because he or she returned to the work force could apply to have the pension reinstated if they became disabled within two years of the time payment of their pension stopped. The applicable statutory provisions are:
Reinstatement of disability pension – (1) Subject to this section, a person who has ceased to receive a disability pension because they have returned to work is entitled to have that disability pension reinstated if, within two years after the month in which they ceased to

[10] Counsel for the Applicant argued that the Automatic Reinstatement provisions became law in 1995, thus the Applicant was entitled to be reinstated in 1997. Unfortunately, Counsel for the Applicant is not correct in his argument. Section 70.1 came into force on January 31, 2005, and is not expressed to be of retroactive application. Thus, the Applicant was not entitled to automatic reinstatement in 1997.

[16] The Respondent indicated that in the event the Appel Division intended to make a decision based on the materials before it, allowing the application that it wished to have the opportunity to make written representations on the matter. Given that the Appeal Division has found that the Applicant has not provided it with any new evidence, which meets the test in subsection 66 (1)(b) of the DESD Act, the Appeal Division finds that it is not necessary for the Respondent to make written submissions in this matter.

CONCLUSION

[17] The Applicant asked the Appeal Division to rescind or amend its decision of August 30, 2015 in which it refused leave to appeal decision of the General Division. In its decision, the General Division found that the Applicant had become disabled in November 2009 and that payment of the disability pension would commence as of March 2010. The Applicant has not presented the appeal Division with any new material fact that would allow it to rescind or amend it decision of August 30, 2015.

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receive the disability pension, they become incapable again of working. (S.C. 2004, c. 22, s.20)

(2) ***Request for Reinstatement*** **–** a request by a person for reinstatement of a disability pension shall be made to the Minister in accordance with the regulations… (namely, section 71)

Section 71 of the *CPP Regulations* provide that the request must (a) be a written request; (b) be made within twelve months after the month in which the applicant became disabled again.

> **71. (1) A request or reinstatement** of a disability pension under section 70.1 of the Act shall be made in writing at any office to the Department of Human Resources Development or the Depart of Human Resources and Skills Development. (SOR/2005-38, s.1)
>
> **(2)** The request shall be made within 12 months after the month in which the person became incapable again of working.

[18] The application to rescind or amend the decision of the Appeal Division issued August 30, 2015 is refused.

Hazelyn Ross
Member, Appeal Division