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

Citation: *M. G. v. Minister of Employment and Social Development,* 2016 SSTADIS 309

Tribunal File Number: AD-16-592

BETWEEN:

M. G.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: August 10, 2016

REASONS AND DECISION

DECISION

[1] The application (Application) to rescind or amend the decision of the Appeal Division is refused.

INTRODUCTION

[2] On April 16, 2015, the Appeal Division (AD) of the Social Security Tribunal (Tribunal) issued a decision refusing leave to appeal the decision of the Tribunal's General Division (GD) dated December 19, 2014. The Applicant now seeks an order rescinding or amending the decision refusing leave.

THE LAW

[3] Section 66 of the *Department of Employment and Social Development Act* (DESDA) reads as follows:

> (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application:
>
> (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 (4) A decision is rescinded or amended by the same Division that made it.

[4] 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. In the context of an Application for Leave to Appeal, the words "at the time of the hearing" must be read as "at the time the

Application was decided." 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.

[5] The test was refined in *Canada (AG) v. MacRae*,[1] a decision made in the context of the former subsection 84(2) of the CPP, which is almost identical to paragraph 66(1)(b) of the DESDA. The Federal Court of Appeal held that (i) an applicant must establish a fact that existed at the time of the hearing but was not discoverable before the hearing by the exercise of due diligence and (ii) the evidence must reasonably be expected to affect the results.

ISSUE

[6] The AD must decide if the Application satisfies the test for new material facts set out in paragraph 66(1)(b) of the DESDA. Specifically, do the information and documents presented by the Applicant constitute new material facts that could not have been discovered with the exercise of due diligence at the time the AD rendered its decision refusing leave to appeal?

SUBMISSIONS

[7] The Applicant submits there is new evidence that warrants the AD rescinding or amending its decision refusing leave to appeal.

[8] On April 18, 2016, the Applicant submitted an Application to Rescind or Amend the AD decision refusing leave to appeal. The Applicant referred to the file number (AD-15-139) associated with the leave application, and he disclosed that he had received the AD's leave to appeal decision on April 22, 2015. The Applicant said he was seeking to rescind or amend the decision on new facts because he was not afforded an opportunity to provide the following particulars to the AD:

(a) The GD erred in law by failing to consider the appropriate legal test in determining the severity of his injury, in particular, the real world factors set out in *Villani v. Canada*.[2]

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[1] *Canada (AG) v. MacRae,* 2008 FCA 82
[2] *Villani v. Canada (AG),* 2001 FCA 248

(b) The GD breached a principle of natural justice by denying him an opportunity to fully present his case at the oral hearing. Specifically, the GD claims there was a lack of medical evidence that he had difficulty with prolonged sitting, yet the GD member did not ask him any questions about it, nor did he inquire about his psychological condition, when medical records clearly indicated that he was depressed.

(c) Had the GD given him the opportunity to address its concerns, his medical record and witnesses would have clearly shown he was suffering from severe difficulty with prolonged sitting and depression at the time of the minimum qualifying period (MQP).

[9] The Applicant also submitted additional documents:

- An affidavit dated April 17, 2016 of K. G., son of the Applicant, detailing his observations of his father's physical and psychological condition;
- A letter dated April 27, 2016 from Dr. Saeedi, the Applicant's family physician.

[10] In submissions dated May 25, 2016, the Respondent argued that the Applicant's submissions did not address the AD's decision of April 16, 2015. It further submitted that they related to the GD decision, and the AD therefore had no basis in law to consider them as applicable to an application to rescind or amend the AD decision.

ANALYSIS

[11] Two provisions of section 66 of the DESDA are particularly important to this Application. They are paragraph 66(1)(b), which sets out the test for "new material facts," and subsection 66(4), which requires that a decision must be rescinded or amended by the same division that made it.

[12] The Applicant submitted his Application to Rescind or Amend within the one-year deadline specified under subsection 66(2) of the DESDA, but in substance it related, not to the AD's Leave to Appeal decision of April 22, 2015, but to the GD's decision of December 19, 2014. The grounds set out in the application are not "new facts" but alleged errors made by the GD that would have been more appropriately made in the Applicant's Leave to Appeal

application of March 19, 2015. The Applicant claims that he was not afforded an opportunity to submit "particulars" of his grounds of appeal to the AD, but there is no evidence that this is true, and in any case it has nothing to do with the test set out in paragraph 66(1)(b).

[13] Having found that the Applicant's submissions in essence address the prior GD decision, the AD also finds that, pursuant to subsection 66(4) of the DESDA, it lacks the requisite jurisdiction to rescind or amend the decision of the GD. Furthermore, as submitted by the Respondent, the Applicant's proposed "new material facts" do not relate to the AD's decision refusing leave to appeal, and there is no evidentiary basis on which the AD could rescind or amend that decision. The question that must be answered is whether, in relation to the AD decision of April 16, 2015, the Applicant has put forward any new material fact that could not have been discovered with the exercise of reasonable diligence. For the reasons that follow, I find that he has not done so.

[14] The Applicant began the process of applying for the *Canada Pension Plan* (CPP) disability benefit in September 2010. He has long been aware that he was required to submit evidence that he suffered from a severe and prolonged disability that precluded him from regularly pursuing a substantially gainful occupation prior to his MQP of December 31, 2005. The submissions that he made in his Application to Rescind or Amend correspond to arguments that he made to the GD in December 2014. Both of the documents that he submitted with his Application were prepared in April 2016 and thus could not have been "discoverable with the exercise of reasonable diligence," at the time of the AD leave to appeal decision in April 2015. Accordingly, none of this evidence can meet the "new facts" test set out in paragraph 66(1)(b) of the DESDA.

CONCLUSION

[15] The Applicant requested the AD to rescind or amend its April 16, 2015 decision, in which it refused leave to appeal GD's decision to deny him CPP disability benefits. I find that the Applicant has not presented any new material fact that could not have been discovered with the exercise of reasonable diligence at the time the decision refusing leave was made.

[16] Therefore, the application to rescind or amend the AD's decision of April 16, 2015 is refused.

Member, Appeal Division