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

Citation: *P. A. v. Minister of Employment and Social Development,* 2016 SSTADIS 325

Tribunal File Number: AD-15-556

BETWEEN:

P. A.

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: Janet Lew

DATE OF DECISION: August 22, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division rendered on June 18, 2015. The General Division determined that the application of May 26, 2014 to rescind or amend the decision of a Canada Pension Plan Review Tribunal made on October 3, 2003 contravened the *Department of Employment and Social Development Act* (DESDA), as it was made more than one year after the decision of the Review Tribunal had been communicated to him. The General Division also determined that even if the application of May 26, 2014 was not statute-barred, the evidence upon which the Applicant relied to rescind or amend the decision of the Review Tribunal did not meet the requirements under subsection 66(1) of the DESDA, as it could not be considered a "new material fact", as that term is defined.

[2] The Applicant sought leave to appeal the decision of the General Division on July 16, 2015, for several reasons. He can only succeed on this application if I am satisfied that the appeal has a reasonable chance of success.

ISSUE

[3] Does the appeal have a reasonable chance of success?

FACTUAL BACKGROUND

[4] This matter has a very lengthy history, as the Applicant has made multiple applications and appeals, all of which originated with an application for a Canada Pension Plan disability pension filed in April 10, 1997. Some background is necessary to appreciate the nature of the application before me:

1. 1979 – the Applicant sustained serious injuries in a motor vehicle accident. He had a lengthy recovery from his injuries.

2. 1981 – the Applicant was involved in a subsequent motor vehicle accident, requiring ongoing medical care. He resumed working in 1987, doing seasonal work in a fish plant.

3. 1993 – the Applicant sustained a work injury and has not been employed since then.

4. April 10, 1997 - the Applicant applied for a Canada Pension Plan disability pension.

5. August 17, 1998 – a Review Tribunal dismissed his appeal. The Pension Appeals Board denied his application for leave to appeal.

6. August 24, 1999 – the Applicant sought to re-open the August 17, 1998 Review Tribunal decision. A Review Tribunal dismissed this first application to re-open. The Applicant's appeal to the Pension Appeals Board and application for judicial review to the Federal Court of Appeal were both dismissed. The Federal Court of Appeal however encouraged the Applicant to make an application under subsection 84(2) of the *Canada Pension Plan.* (*A. v. Canada (A.G.)*, 2003 FCA 253).

7. October 2, 2003 – a Review Tribunal granted the Applicant's second application to re-open the August 17, 1998 Review Tribunal decision. The Review Tribunal determined a deemed date of disability of January 1996, with payment of a Canada Pension Plan disability pension effective as of May 1996. This constituted the 15-month maximum retroactivity for a deemed date of disability permitted under the *Canada Pension Plan.*

8. December 8, 2003 – the Applicant appealed the amount of his disability pension. On December 7, 2004, a Review Tribunal dismissed his appeal. The Applicant appealed further to the Pension Appeals Board, on the basis that he had been incapacitated since 1979. The Pension Appeals Board dismissed his appeal. The Federal Court of Appeal denied his application for judicial review

(*A. v. Canada (A.G.)*, 2006 FCA 411). The Supreme Court of Canada denied leave to appeal.

9. July 2007 – the Applicant made an application to re-open the October 2, 2003 decision based on new facts. A Review Tribunal and Pension Appeals Board dismissed his appeals (*A. v. Minister of Human Resources and Skills Development* (August 26, 2010), CP26258 (PAB)). The Pension Appeals Board described the Applicant's new facts application as a "fishing expedition, in a pond containing no fish" which, in the law relating to applications, amounted to an abuse of process. The Applicant sought judicial review to the Federal Court of Appeal, which found that the Applicant's most recent "application" to the PAB was but another attempt to revisit the quantum of his benefit and determined that, "[a]s previously noted, all avenues of appeal with respect to that issue have been exhausted". It also described his correspondence "benevolently as confusing" (*A. v. Canada (A.G.)*, 2011 FCA 75).

10. May 26, 2014 – the Applicant made a second application to re-open the October 2, 2003 decision based on new facts. This second application was made under subsection 66 of the DESDA. The "new facts" consisted of the attachments to his application at RA1, which includes a document titled, "Part B – medical report – incapacitated child of a veteran/member" (RA1- 21 to RA1-23). The General Division dismissed this second application on June 18, 2015.

SUBMISSIONS

[5] The Applicant submits that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, that it erred in law and that it based its decision on erroneous findings of fact without regard for the material before it. The submissions were muddled and disjointed at best. The Social Security Tribunal provided a copy of the leave materials to the Respondent. However, the Respondent did not file any submissions.

ANALYSIS

[6] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to the following:

> (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.

[7] I need to be satisfied that the reasons for appeal fall within one of the grounds of appeal and that the appeal has a reasonable chance of success before granting leave. The Federal Court of Canada endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

(a) Appeal as of right

[8] The Applicant submits that he is entitled to an appeal as of right under subsection 56(2) of the DESDA and that he therefore does not have to seek leave to appeal to the Appeal Division. That section provides that no leave is necessary in the case of an appeal brought under subsection 53(3) of the DESDA.

[9] Subsection 53(3) of the DESDA deals with summary dismissals. The General Division indicated that it proceeded on the written record. It did not summarily dismiss the application to rescind or amend. Subsection 56(2) of the DESDA therefore does not apply and the Applicant must seek leave to appeal.

(b) Jurisdiction of the Appeal Division

[10] The Applicant alleges that the Tribunal is empowered to decide any questions of law and fact under section 64 of the DESDA, including whether he can be deemed disabled before January 1996 or whether he is entitled to greater retroactivity of payment of a disability pension.

[11] Subsection 64(1) of the DESDA provides that the Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under the DESDA. The questions of law which the Applicant suggests the Appeal Division is empowered to decide are not necessary for the disposition of this application for leave to appeal, nor do they address any of the grounds of appeal. I am not satisfied that the appeal has a reasonable chance of success under this ground.

[12] Although the Applicant argues that the Tribunal is empowered to decide any questions of law or fact, at the same time, he submits that the Tribunal lacks any jurisdiction to decide whether he was incapacitated, as he claims that power is reserved exclusively for the Respondent under subsection 60(8) of the *Canada Pension Plan.*

[13] The Respondent denied the Applicant's initial request for a review of the amount of his monthly disability pension, initially and upon reconsideration. The Applicant then appealed to a Canada Pension Plan Review Tribunal. A Review Tribunal initially addressed the issue as to whether the Applicant was incapacitated. It was empowered to decide the appeal under former subsection 82(1) of the *Canada Pension Plan*, as it read immediately before April 1, 2013.

[14] The issue as to whether the Applicant could be found incapacitated came before the General Division through his application to rescind or amend the October 2003 decision of the Review Tribunal. The General Division was empowered to address the application under section 66 of the DESDA.

(c) Incapacity

[15] The Applicant argues that he has been incapacitated since his motor vehicle accident in 1979. He first raised the incapacity issue in his appeal to the Pension Appeals

Board in 2005. For the most part, he calls for a reassessment on the issue of whether he was incapacitated following his motor vehicle accident in 1979. As the Federal Court held in *Tracey*, it is not the role of the Appeal Division to reassess the evidence altogether. Rather, its role on an application for leave to appeal is to determine whether the General Division erred in law, made an erroneous finding of fact or failed to observe a principle of natural justice, as set out under subsection 58(1) of the DESDA.

(d) Statutory bar

[16] The Applicant could have made an application to re-open the October 2003 decision of the Review Tribunal up to and including March 31, 2013, without facing the issue of the statutory time limit. The issue of the statutory time limit only arose once the DESDA came into force and operation on April 1, 2013.

[17] The Applicant argues that the General Division erred in finding that his application to rescind or amend the decision of the Review Tribunal was statute-barred under subsection 66(2) of the DESDA. He suggests that he was continuously incapacitated between 1979 and 2015 and, as such, the one-year time limit under subsection 66(2) does not strictly apply to bar his application.

[18] Subsection 66(2) of the DESDA requires an applicant to file an application to rescind or amend a decision within one year after the day on which a decision has been communicated. In this case, however, it is moot as to whether the General Division might have erred in finding that the May 2014 application to rescind or amend was statute-barred under subsection 66(2) of the DESDA, as the General Division proceeded to determine whether the evidence filed could constitute "new facts" under the DESDA anyway. That being so, I will make some observations.

[19] The incapacity provisions under subsection 60(8) of the *Canada Pension Plan* appear to apply only to applications for benefits. The subsection reads:

> Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an

> application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

[20] The subsection makes no reference to applications to rescind or amend. Subsection 60(1) of the *Canada Pension Plan* indicates that no benefit is payable under the *Canada Pension Plan* unless payment of the benefit has been approved under the *Canada Pension Plan*. This being so, the Applicant cannot avail himself of the incapacity provisions under the *Canada Pension Plan*, as his application to rescind or amend was made under the DESDA.

[21] Even if the incapacity provisions extended to applications to rescind or amend under the DESDA, the Applicant would not have succeeded in advancing a case for incapacity, based on the evidence before the General Division. Given the General Division's reasoning regarding the requirements under subsection 66(2) of the DESDA, the imperative dates whereby the Applicant would have had to prove that he was incapacitated to overcome the issue of the statutory bar is from October 3, 2004 – one year after the date on which the decision of the Review Tribunal was communicated to him - to May 26, 2014, when he filed his application to rescind or amend.

[22] The Applicant's submissions to the General Division were difficult to follow, but he clearly raised the incapacity issue, for the purposes of seeking greater retroactivity of payment of a Canada Pension Plan disability pension to 1979. The Applicant appears to have been unaware of the limitation issue under subsection 66(2) of the DESDA and therefore did not explicitly rely on his alleged incapacity to address it. Nonetheless, at paragraph 13, the General Division addressed the Applicant's argument that he had been incapacitated from 1979 to 2014. The General Division noted that in the proceedings before the 2003 Review Tribunal, the Applicant had adduced evidence of injuries sustained in a motor vehicle accident in 1979 and accordingly, found that the Applicant's submissions that he was incapacitated did not represent a new material fact. The General Division did not examine whether the Applicant could have been continuously incapacitated between

October 3, 2004 and May 26, 2014, but this would have been an entirely fruitless exercise to undertake, if the incapacity provisions had been available to him, as the Applicant had not provided any medical or other evidence between October 3, 2004 and May 26, 2014 which suggests that he met the incapacity requirements under the *Canada Pension Plan.* The only medical evidence he had filed with his application to rescind or amend was a report dated May 20, 2010, which indicated that he did not have any impairments with perceiving, thinking and remembering (RA1-22).

[23] I am not satisfied that the appeal has a reasonable chance of success on the basis that the General Division failed to consider whether the Applicant was incapacitated between October 3, 2004 and May 26, 2014. As I have indicated above, the incapacity provisions under the *Canada Pension Plan* were not available to the Applicant on his application to rescind or amend.

(e) Jurisdiction of the General Division

[24] The Applicant argues that the General Division refused to exercise its jurisdiction when it failed to assess his application to re-open under subsection 84(2) of the *Canada Pension Plan*. There is no merit to this submission as the General Division does not have jurisdiction to assess applications to re-open made under subsection 84(2) of the *Canada Pension Plan,* such as the Applicant's May 26, 2014 application to re- open. That provision was no longer in force on that date, and the Applicant made his application under section 66 of the DESDA. I note in any event that the General Division, despite having found that the application to rescind or amend was statute- barred, still assessed the Applicant's "new facts" application.

(f) Natural justice

[25] The Applicant claims that the General Division failed to observe a principle of natural justice as it did not provide him with an opportunity to explain why he had not produced evidence of his alleged incapacity to the Review Tribunal, nor did it allow him to make any additional submissions on the incapacity issue. He suggests that the General Division dismissed his incapacity arguments as he had not explained why he had not

adduced the Veterans Affairs Canada medical report at the hearing before the Review Tribunal.

[26] The Applicant is unable to rely on the incapacity provisions to overcome the limitation period under subsection 66(2) of the DESDA. Despite this, and the fact that the General Division determined that the Applicant failed to explain why the Veterans Affairs medical report had not been presented to the Review Tribunal, it still examined the report to determine whether it could constitute a "new material fact". The General Division found that the claim was based on the "same incident and injuries as was considered by the Review Tribunal" and, as such, did not constitute a new material fact. It also found that other evidence the Applicant relied on for his "new facts" application had already been presented to the Review Tribunal in 2003. In other words, the General Division found that the evidence could not reasonably be expected to affect the result of the 2003 Review Tribunal.

[27] The Applicant did not offer what additional submissions he might have made, had the General Division invited them, nor did he endeavour to dispel the General Division's findings that the evidence was based on the "same incident and injuries as was considered by the Review Tribunal".

[28] Subsections 60(8) to 60(11) of the *Canada Pension Plan* contain the incapacity provisions. They provide that if an applicant had been incapable of forming or expressing an intention to make an application under the *Canada Pension Plan* on his or her own behalf on the day on which the application was actually made, the application can be deemed to have been made in the month preceding the first month in which the relevant benefit could have been commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

[29] If the Applicant was seeking retroactive payments to 1979, he would have had to establish that he was continuously incapacitated from 1979 to April 1996, the month before the disability pension commenced to be paid.

[30] The *Medical report – incapacitated child of a Veteran/member* indicates that the Applicant did not have any impairment with perceiving, thinking and remembering (RA1-22). The Applicant did not provide any other medical evidence with his rescind or amend application which addressed the timeframe from 1979 to April 1996.

[31] Applying the principles set out in *Canada (Attorney General) v. Hines*, 2016 FC 112, it is not enough for an applicant to allege that he was incapacitated, as there must be sufficient evidence to establish incapacity. The evidence before the General Division simply does not support a finding that the Applicant was continuously incapable of forming or expressing an intention to apply for a benefit at any time after his motor vehicle accident in 1979.

[32] Natural justice is concerned with ensuring that an appellant has a fair and reasonable opportunity to present his case, that he has a fair hearing, and that the decision rendered is free of any bias or the reasonable apprehension or appearance of bias. There is no indication or any evidence that the General Division deprived the Applicant of a reasonable and fair opportunity to present his case.

[33] These considerations aside, an application process contemplates that an applicant will fully set out the basis for his application. In an application to rescind or amend, the General Division should be able to expect that an applicant will provide all of the documentation or evidence upon which he relies to advance an application to rescind or amend, and that there is some accompanying explanation of how that new evidence meets the requirements under section 66 of the DESDA, if it is not apparent from the evidence itself. The Federal Court of Appeal alluded to this in its 2011 *A.* decision (although of course it was in the context of subsection 84(2) of the *Canada Pension Plan*).

[34] I am not satisfied that the appeal has a reasonable chance of success on this ground.

(g) Respondent's position

[35] In submissions filed on July 16, 2015, the Applicant suggests that it is inherently unfair that the General Division did not require the Respondent, as a party to the proceedings with an interest in the outcome, to file any written submissions in response to

the application to rescind or amend. He alleges that this amounts to a breach of natural justice.

[36] From time to time, submissions from the Respondent might be helpful to an applicant or appellant, or to the General Division itself, but there is no duty on the Respondent to file any submissions to an application to rescind or amend (or for that matter, to an application for leave to appeal). In any event, there is no indication here that it would have been advantageous for the Applicant had the Respondent filed any written submissions in response to the application to rescind or amend.

(h) 2006 decision of Pension Appeals Board

[37] The Applicant argues that the Pension Appeals Board erred in finding that he did not have a disability before May 1996.

[38] This argument is not germane to this application for leave to appeal, as the Applicant needs to identify grounds of appeal under subsection 58(1) of the DESDA that relate to or arise from the June 2015 decision of the General Division. In any event, the Applicant already availed himself of the opportunity to seek judicial review of the decision of the Pension Appeals Board. Desjardins J.A. of the Federal Court of Appeal dismissed his application, indicating that she was not persuaded that the Pension Appeals Board made any errors. The Supreme Court of Canada denied leave to appeal. Any efforts on the part of the Applicant to re-visit the decision of the Pension Appeals Board represent a collateral attack against the decision of the Federal Court of Appeal. It would be improper for me to revisit this matter.

(i) Decisions of Review Tribunal

[39] The Applicant argues that the Review Tribunal based its decision on erroneous findings of fact that it made without regard for the material before it. It is unclear to which decision he refers, as there have been multiple appeals and applications to Review Tribunals. He claims that the 2003 Review Tribunal ought to have determined that he was disabled following his 1979 motor vehicle accident, given the evidence

[40] This argument is not germane to the application for leave to appeal. The Applicant needs to identify grounds of appeal under subsection 58(1) of the DESDA that relate to or arise from the June 2015 decision of the General Division. This does not extend to decisions of the Review Tribunal.

[41] With respect to the decisions of the Review Tribunal, as the Federal Court of Appeal determined in its 2011 decision, “all avenues of appeal with respect to that issue [regarding the amount of the disability pension] have been exhausted”.

CONCLUSION

[42] The application for leave to appeal is denied.

Janet Lew
Member, Appeal Division