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

Citation: *G. L. v. Minister of Employment and Social Development,* 2016 SSTGDIS 100

Tribunal File Number: GP-16-2244

BETWEEN:

G. L.
(formerly G. R.)

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Valerie Hazlett Parker

HEARD ON: November 24, 2016

DATE OF DECISION: December 9, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

G. L., Applicant

PRELIMINARY MATTERS

[1] The Appellant advised the Tribunal that she married in September 2015, and her surname is now L. The title of proceedings is amended to reflect this change.

[2] The Tribunal was not able to record the teleconference hearing due to technical problems with the teleconference service. The Appellant agreed to proceed with the hearing without it being recorded.

INTRODUCTION

[3] This application involves a request to rescind or amend a decision of the General Division of the Social Security Tribunal (Tribunal) dated June 15, 2015 in accordance with section 66 of the *Department of Employment and Social Development Act* (the "DESD Act") ("Application to Rescind or Amend").

[4] The application was to be heard by videoconference for the following reasons:

a) Videoconferencing was available within a reasonable distance of the area where the Appellant lives;

b) The issues under appeal were complex;

c) There were gaps in the information in the file and/or a need for clarification; and

d) This method of proceeding respected the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[5] On October 4, 2016 the Appellant requested, in writing, that the hearing be held by teleconference to accommodate her health. The Respondent did not reply to the request. On teleconference. The teleconference hearing was held on November 24, 2016.

ISSUES

[6] The Tribunal must decide if this application to rescind or amend is a collateral attack on the Appeal Division decision to refuse leave to appeal the General Division decision of June 15, 2015.

[7] The Tribunal must decide whether the evidence filed in support of the Application to Rescind or Amend establishes a new material fact within the meaning of paragraph 66(1)(b) of the DESD Act.

[8] If the Tribunal finds that there is a new material fact within the meaning of paragraph 66(1)(b) of the DESD Act, the Tribunal must then decide whether the Applicant's disability was severe and prolonged within the meaning of the *Canada Pension Plan* (CPP) as of December 31, 2005.

BACKGROUND AND HISTORY OF PROCEEDINGS

[9] The Appellant first applied for a CPP disability pension in November 2007. This application was denied by the Respondent, and not pursued further by the Appellant.

[10] The Appellant applied again for a CPP disability pension on June 27, 2013. The Respondent denied this application initially and upon reconsideration. The Appellant appealed this decision to the Office of the Commissioner of Review Tribunals. The appeal was transferred to the Tribunal. On June 15, 2015 the General Division of the Tribunal dismissed the appeal. The Appellant requested leave to appeal this decision to the Appeal Division of the Tribunal, and this request was denied. The Appellant then made this application to rescind or amend the General Division decision.

[11] The Appellant claimed that she was disabled by depression and anxiety including panic attacks. She also suffers from seizures which she believes are caused by her mental illness. The General Division of the Tribunal concluded that there was insufficient evidence of her condition at the time of her Minimum Qualifying Period (MQP) to establish that she was disabled under the CPP.

COLLATERAL ATTACK

[12] There is a principle in law that prohibits a party from making a collateral attack on a prior decision. A claimant cannot call into question the result of a final decision by requesting rescission of a decision made prior to this final one. For example, if a claimant applied for a CPP disability pension and their appeal to the General Division of the Tribunal was dismissed and the appeal of this decision to the Appeal Division was also dismissed, they could not then bring an application to rescind or amend the decision of the General Division for a CPP disability pension based on the same facts. This would be a collateral attack on the Appeal Division decision as it would ask the General Division to decide the same legal issue that had been decided by the Appeal Division on a final basis.

[13] I am satisfied that the Appellant in this case did not bring a collateral attack on the Appeal Division decision by applying to rescind or amend the General Division decision. The Appeal Division decision did not consider the merits of the disability claim. It examined only if the General Division decision may have contained an error under s. 58 of the DESD Act such that the appeal might have a reasonable chance of success. Accordingly, the issue now before the General Division is not the same as what the Appeal Division decided.

RESCIND OR AMEND APPLICATION

The Law

[14] Subsection 66(1) of the DESD Act reads as follows:

> 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.

Documents Submitted as New Facts

[15] The Applicant submitted the following documents in support of the Application to Rescind or Amend:

a) Letters from Dr. Surkes dated November 28, 2012 and December 11, 2012. These reports explain the Appellant's medical conditions and proposed treatments at the date they were written. The Appellant testified that she was not treated by Dr. Surkes for very long, and that he was not treating her in 2005 (the time of her MQP).

b) A list of health service visits in Alberta for the period of July 2005 to June 2006. The document lists the dates that medical services were provided to her with codes for payment to the physician. The Appellant testified that she contacted Alberta health services to obtain medical records around the time of the MQP. She did not have a family doctor at that time, so was treated at walk in clinics. One of these clinics has since closed. This report is the only information that she could obtain to establish that she was treated for depression at the time of the MQP.

c) A letter from the Appellant's husband dated June 28, 2016. This letter sets out the Appellant's struggles with her disabilities. The Appellant testified that she and her husband were married in 2015. She knew of him at the time of the MQP, but they were not dating then.

d) A letter from the Co-operator's insurance dated June 3, 2016. The letter states that the Appellant is not eligible for life insurance because of her history of mental illness. The Appellant testified that she and her husband both applied for life insurance in or around May 2016. She did not have life insurance and had not applied for life insurance prior to this date.

Submissions

[16] The Applicant submitted that she provided all of the information that she had regarding her disability that was available at the relevant time. She also disagreed with some of the statements made in the General Division decision. For example, she testified that the only reason she did not lose her job at the warehouse despite missing many days of work was because her employer was her Father-in-law. In addition, the only way she was able to complete the accounting course she took was because she was able to work at her own pace, and it took longer than it should have to be completed.

[17] The Respondent submitted in writing (RA5) that the documents presented as new facts do not meet the legal test for "new facts" under the DESD Act, and therefore the application should be dismissed.

Analysis

[18] The Applicant must prove on a balance of probabilities that the evidence filed in support of the Application to Rescind or Amend establishes a new material fact within the meaning of paragraph 66(1)(b) of the DESD Act.

[19] Before paragraph 66(1)(b) of the DESD Act came into force in April 2013, the Federal Court of Appeal set out a test for evidence to be admissible as a "new fact" in relation to former subsection 84(2) of the CPP:

a) It must establish a fact (usually a medical condition in the context of the CPP) that existed at the time of the original hearing but was not discoverable before the original hearing by the exercise of due diligence (the "discoverability test"), and

b) The evidence must reasonably be expected to affect the results of the prior hearing (the "materiality" test).

(*Canada (Attorney General) v. Macrae*, 2008 FCA 82)

[20] The documents presented as new facts in this case do not meet this two part test of new facts under s. 66 of the DESD Act.

[21] The Appellant produced two letters penned by Dr. Surkes. They are dated November 2012 and December 2012. The Appellant was not clear about what date she was treated by Dr. Surkes, however, testified that she was not treated by him at the time of her MQP. These letters existed at the time of the General Division hearing in June 2015. The Appellant provided no explanation for not producing them at that hearing. They were discoverable at that time. In addition, these reports speak to the Appellant's condition in 2012, approximately seven years after the MQP. Therefore they are not material to the decision to be made. They are not new facts.

[22] The Appellant also produced a list of health services provided to her in 2005 in Alberta. The Tribunal accepts that the Appellant could not have obtained any better information from Alberta. However, this information is not material. A listing of health services provided does nothing to clarify what the services were, or how serious her condition was at the time of the MQP.

[23] The Appellant's husband penned a letter in June, 2016. This document did not exist at the time of the General Division hearing, so was not discoverable. It is not a new fact.

[24] Finally, the Appellant produced a letter denying her application for life insurance in 2016. This letter also did not exist at the time of the General Division hearing, so was not discoverable. Although the letter refers to a history of mental illness, it does not provide any information regarding the severity of the condition or treatment at the MQP. Therefore it is not material.

CONCLUSION

[25] The Application to Rescind or Amend is dismissed. While the Tribunal accepts that the Appellant has done what she can to obtain information to support her claim, the documents produced do not meet the legal test to be new facts under the legislation.

Valerie Hazlett Parker
Acting Vice-chair and Member, General Division - Income Security