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

Citation: *V. E. v. Minister of Employment and Social Development*, 2016 SSTADIS 513

Tribunal File Number: AD-16-1125

BETWEEN:

V. E.

Applicant

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

Leave to Appeal Decision by: Janet Lew

Date of Decision: December 30, 2016

REASONS AND DECISION

INTRODUCTION

[1] At its core, this case is about whether the Applicant was out of time when she filed an application on March 31, 2016 with the General Division to rescind or amend the decision of a Canada Pension Plan Review Tribunal rendered on December 10, 2002, and whether there is any statutory basis whereby the Applicant is entitled to greater retroactivity of payment of a Canada Pension Plan disability pension.

[2] On August 19, 2016, the General Division dismissed her application to rescind or amend, having found that she was not only out of time but that the Review Tribunal had already granted the maximum retroactivity available by which she could be deemed disabled. The Applicant filed an application requesting leave to appeal on September 13, 2016, invoking several grounds of appeal. The Applicant filed additional submissions on October 13, 2016.

ISSUE

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

BACKGROUND & HISTORY OF PROCEEDINGS

[4] The factual background is not in dispute. The Applicant filed an application for a disability pension in July 1997. The Respondent denied the application but the Applicant did not pursue an appeal.

[5] The Applicant filed a second application for disability pension, in May 2001. She maintained that she had become disabled and was no longer able to work since 1996, due to several medical issues. She worked briefly in 1999, but this represented a failed work attempt. The Respondent denied her application initially and upon reconsideration. The Applicant filed an appeal to the Review Tribunal.

[6] On January 27, 2003, the Review Tribunal allowed the Applicant's appeal. Although the Review Tribunal found the date of onset of disability to be April 1, 1997, it

noted that the *Canada Pension Plan* stipulates that a person may only be deemed disabled up to a maximum of fifteen months prior to the month in which his or her application was received. As the Applicant had applied for disability benefits in May 2001, the Review Tribunal deemed her disabled as of February 2000 with benefits commencing June 2000 (GD2-101 to GD2-112).

[7] The Respondent sought leave to appeal the decision of the Review Tribunal to the Pension Appeals Board (PAB) but on December 8, 2003, the PAB refused leave to appeal (GD2-95). There is no indication that the Applicant sought to appeal the decision of the Review Tribunal to the PAB.

[8] On March 31, 2016, the Applicant filed an application to rescind or amend the decision of the Review Tribunal. She indicated that she had received the decision of the Review Tribunal on April 15, 2003. She filed additional records, including documents relating to her surgery in 2004. She also included a letter dated May 5, 1997 from her psychologist. This letter had been before the Review Tribunal.

ANALYSIS

[9] Subsection 58(1) of the *Department of Employment and Social Development Act* (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.

[10] Before granting leave, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESDA and that the appeal

has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General),* 2015 FC 1300.

(a) Breach of natural justice and failure to exercise jurisdiction

[11] The Applicant submits that the General Division failed to observe a principle of natural justice and refused to recognize or exercise its jurisdiction in failing to consider new material she had filed with her application to rescind or amend.

[12] Natural justice is concerned with ensuring that an applicant 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 her case, or that it exhibited any bias.

[13] The Applicant claims that the General Division failed to consider new material she had filed with her application to rescind or amend. As the General Division dismissed the Applicant's appeal on other grounds, it would have been a moot exercise and would not have changed the outcome, if it had not reviewed or considered the additional medical and other materials. Nonetheless, the General Division indicated at paragraph 17 that it had in fact reviewed the Appellant's new materials. The General Division stated that, "in this case no additional facts have been submitted". In other words, the General Division found that the new material facts did not meet the requirements under paragraph 66(1)(b) of the DESDA. Although it is not for me to assess the evidence at this leave juncture, I note that, apart from the psychologist's report and a chronology prepared by the Applicant, none of the new materials accompanying the application to rescind or amend addressed the issue as to whether the Applicant could be found disabled in 1997. A chronology prepared by an applicant generally does not meet the test of a new material fact, i.e. one that could not have been discovered at the time of the hearing with the exercise of reasonable diligence. I am not satisfied that the appeal has a reasonable chance of success on this ground.

(b) Errors of law

[14] The Applicant further alleges that the General Division's focus on "dates, dates, dates, and time, time, time" was misplaced, as the member failed to consider the "human factor" and the fact that she was suffering through pain and other trauma.

[15] The General Division correctly noted that subsection 66(2) of the DESDA requires that an application to rescind or amend a decision be made within one year after the day on which a decision had been communicated to an appellant. Although I might have determined that the one year period commenced on April 1, 2013, when the DESDA came into force and effect, nonetheless the Applicant would have continued to have been late in filing an application to rescind or amend, when she filed her application in March 2016. There are no provisions in the DESDA which relieve against the strict time limits under subsection 66(2). For this reason, I am not satisfied that the appeal has a reasonable chance of success on this ground.

[16] The Applicant continues to assert that she became disabled in April 1997, and that the General Division therefore ought to have determined that the disability pension should commence effective April 1997. What bears repeating is that the Review Tribunal found that the Applicant became disabled in April 1997.

[17] However, under paragraph 42(2)(b) of the *Canada Pension Plan* , "in no case shall a person . . . be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made" (my emphasis). As the General Division rightly noted, it did not have any jurisdiction or authority to extend the maximum retroactivity period under paragraph 42(2)(b) of the *Canada Pension Plan.* It was immaterial whether the Applicant had produced a new material fact as defined by paragraph 66(1)(b) of the DESDA, as this would not have enabled her to overcome the maximum retroactivity provisions of the *Canada Pension Plan*. Accordingly, I am not satisfied that the appeal has a reasonable chance of success on this ground.

CONCLUSION

[18] The application for leave to appeal is dismissed.

Janet Lew
Member, Appeal Division