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

Citation: *M. S. v. Minister of Employment and Social Development*, 2017 SSTADIS 17

Tribunal File Number: AD-16-992

BETWEEN:

M. S.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: January 22, 2017

REASONS AND DECISION

DECISION

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

INTRODUCTION

[2] On April 16, 2016, the Appeal Division of the Social Security Tribunal (Tribunal) refused leave to appeal a decision of the General Division dated September 4, 2015. The Applicant now seeks an order rescinding or amending the decision of the Appeal Division to refuse leave.

BACKGROUND

[3] The Applicant has a long and varied vocational history and most recently worked as a self-employed owner-operator of a bed-and-breakfast. She fractured her foot in May 2010 and applied for Canada Pension Plan (CPP) disability benefits in February 2012, claiming that she was unable to work because of the combined effects of a number of medical conditions, including degenerative osteoarthritis with severe spinal stenosis, sleep disorder, and anxiety and depression.

[4] The Respondent rejected her claim initially and on reconsideration. She appealed to the General Division, and following an in-person hearing on July 27, 2015, it found, on a balance of probabilities, that the Applicant did not suffer from a "severe" disability that rendered her incapable regularly of pursuing any substantially gainful occupation as of her minimum qualifying period (MQP) date of December 31, 2004.

[5] On December 4, 2015, the Applicant submitted to the Appeal Division a request for leave to appeal, alleging that the General Division committed various errors, as enumerated in subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA).

[6] In a letter dated January 25, 2016, the Appeal Division requested points of clarification from the Applicant as follows:

> At page two (2) of your application for leave to appeal, you refer to a report, which you describe as a "replica of former documentation as provided through CPP correspondence and duplication as outlined in the record to deny you benefits."
>
> - Please indicate the report that you are referring to.
>
> Also, in your application for leave you state that you "provided proof" that your conditions were as severe and prolonged as the CPP legislation dictates.
>
> - Please identify this proof.
>
> You have raised a number of allegations of bias against the General Division Member, Ms. Shamatutu.
>
> - Please indicate by reference to the recording of the hearing where the Member was either "intimidating, hostile towards the witnesses and dismissive of the sworn testimonies; or
> - Completely ignored facts that would have decided a decision in your favour; or
> - Prevented witnesses from testifying; or
> - Ignored the testimony of your pharmacist."
>
> In addition, please indicate by reference to the recording of the hearing, the basis of your claim that the General Division Member had come to a decision prior to the hearing. The Tribunal must receive your response by February 29, 2016.

[7] This letter was addressed solely to the office address of a paralegal who had represented the Applicant at the oral hearing before the General Division. The Applicant later advised the Tribunal that she had discharged this paralegal and had thus never received the Appeal Division's query letter. In the meantime, the February 29, 2016 deadline came and went, and the Appeal Division proceeded with its decision without having received a response from the Applicant. In its decision dated March 21, 2016, the Appeal Division refused leave to appeal, finding that none of the grounds advanced by the Applicant had a reasonable chance of success.

[8] On May 4, 2016, the Applicant sent the Tribunal a letter advising it that she became aware that her appeal had been dismissed only after she received the Appeal Division's decision refusing her leave. As she had never received the Appeal Division's query letter of January 25, 2016, she could not have been expected to respond to it. She reiterated her allegations against the General Division and asked for an extension of time to respond to the Appeal Division's query letter.

[9] In a letter dated June 6, 2016, the Chair of the Tribunal advised the Applicant that the decision of the Appeal Division was final, but that there were two options available to her: (i)

apply for judicial review before the Federal Court or (ii) apply to the Tribunal to rescind or amend the decision of the Appeal Division.

[10] The Applicant submitted an application to rescind or amend on August 5, 2016.

THE LAW

[11] Section 66 of the DESDA reads as follows:

> (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.

[12] 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.

[13] The test was refined in *Canada (A.G.) 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

[1] *Canada (Attorney General) v. MacRae*, 2008 FCA 82.

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

[14] The Appeal Division 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 Appeal Division rendered its decision refusing leave to appeal?

SUBMISSIONS

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

[16] On August 5, 2016, the Applicant submitted an application to rescind or amend the decision of the Appeal Division to refuse leave to appeal. The Applicant referred to the file number (Appeal Division-15-1305) associated with the leave application and said she was seeking to rescind or amend the decision because she was not afforded an opportunity to provide the following particulars to the Appeal Division:

(a) The member of the General Division who presided over her appeal behaved unprofessionally. She badgered her for dates that she could not remember and often interrupted and redirected witnesses during their testimony. She appeared to be agitated and turned off the recorder to tell participants to be quiet. One witness who was present at the hearing was not asked to testify at all.

(b) Although it was referred to during the hearing, the report of her pharmacist was completely ignored on the record. The report offers an important opinion about her situation and serves as an objective overview of her pharmaceutical interventions dating back to 2001.

(c) Paragraph 45 of the General Division's decision is an almost verbatim citation of the reports used to justify denying her benefits, with no consideration of the

evidence brought forward during the hearing. The decision's analysis is full of errors and makes no mention of the sworn testimony of her witnesses. It cites case law but provides no detail about the outcome of those cases.

(d) The decision disregarded evidence brought forward at the hearing. The witnesses gave consistent testimony that the Applicant has suffered from a severe and prolonged disability since December 31, 2004, yet the General Division did not acknowledge them as reliable.

[17] The Applicant also submitted the following documents:

- Report of Michael Marini, pharmacist, dated July 27, 2015;
- Report of Ram Prayaga, psychiatrist, dated July 18, 2016;
- Statement of Frank Bernt dated July 2, 2016;
- Statement of Judie Bowerbank dated July 20, 2016;
- Statements of Shannon Bramer and David Berry dated July 17, 2015; and
- Letter from Applicant dated July 28, 2016.

ANALYSIS

[18] 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 be rescinded or amended by the same division that made it.

[19] The Applicant submitted her 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 Appeal Division's leave to appeal decision of March 21, 2016, but to the General Division's decision of September 4, 2015. The grounds set out in the application are not "new facts" but alleged errors made by the General Division that mirrored the Applicant's leave to appeal application of December 4, 2015. The Applicant claims that the General Division prevented her

from fully presenting her case and disregarded relevant evidence before it, but these allegations have nothing to do with the test set out in paragraph 66(1)(*b*).

[20] It appears that the Applicant has been operating under a misapprehension that bringing an application to rescind or amend to the Appeal Division will yield a generalized review of the decision of the General Division. In fact, paragraph 66(1)(*b*) provides for exceptional recourse in the relatively rare situation where material new facts emerge that were not reasonably discoverable at the time of the hearing. Under this provision, the General Division can examine alleged new facts only as they pertain to decisions of the General Division, and the Appeal Division can rescind or amend only prior decisions of the Appeal Division. In this case, Applicant's submissions revolve entirely around the General Division's conduct, and I cannot review such allegations in the context of a section 66 application.

[21] The ostensible subject of the current application is the Appeal Division's decision of March 21, 2016, which determined that none of the Applicant's allegations of error against the General Division had a reasonable chance of success on appeal. In particular, the Appeal Division found nothing to indicate that the General Division treated the Applicant unfairly or that it disregarded or misinterpreted her evidence. The Appeal Division does not ordinarily accept evidence on the merits of disability—whether old or new—and it concluded that the Applicant's submissions amounted to no more than an expression of her disagreement with the General Division's decision.

[22] The Appeal Division proceeded with its decision to refuse leave without the benefit of a response from the Applicant to its January 25, 2016 query letter. In correspondence, the Applicant has suggested that this constituted an injustice, as the letter was not properly communicated to her. However, it is not within my jurisdiction to review the conduct of a fellow member of the Appeal Division, and whether she was justified in refusing leave is a separate issue from whether there were new facts that might justify rescinding or amending her decision.

[23] The Applicant has also submitted a number of documents with her application to rescind or amend, but they all were either presented to the General Division prior to the September 4, 2015 hearing or prepared well after that date. The question that must be answered is whether, in

relation to the Appeal Division decision of March 21, 2016, the Applicant has put forward any new material fact that could not have been discovered with the exercise of reasonable diligence. I find that none of the evidence submitted on August 5, 2016, meets the test set out in paragraph 66(1)(*b*) of the DESDA. As such, there is no evidentiary basis on which the Appeal Division could rescind or amend its prior decision.

CONCLUSION

[24] The Applicant requested the Appeal Division to rescind or amend its March 21, 2016 decision, in which it refused leave to appeal the General Division's decision to deny her CPP disability benefits. I find that the Applicant has not presented any new material facts that could not have been discovered with the exercise of reasonable diligence at the time the decision refusing leave was made.

[25] The application is refused.

Member, Appeal Division