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

Citation: *W. L. v. Minister of Employment and Social Development*, 2017 SSTADIS 103

Tribunal File Number: AD-16-1392

BETWEEN:

W. L.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: March 15, 2017

REASONS AND DECISION

OVERVIEW

[1] This is an application to rescind or amend the decision of the Appeal Division rendered on April 20, 2015. The Applicant filed an application to rescind or amend on December 20, 2016. The application indicates that it is in respect of the decisions of both the General Division and the Appeal Division. The Applicant relies on several medical reports and records in support of her application.

[2] Having determined that no further hearing is required, this matter is proceeding pursuant to paragraph 48(*a*) of the *Social Security Tribunal Regulations.*

ISSUE

[3] Does the Applicant meet the requirements under section 66 of the *Department of Employment and Social Development Act* (DESDA), so that I may consider rescinding or amending the decision of the Appeal Division?

ANALYSIS

[4] Section 66 of the DESDA sets out the bases upon which the Appeal Division may rescind or amend a decision given by it. The section reads:

> Amendment of decision
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> **66.** (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if
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> (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.
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> Time limit

(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.

Limit

(3) Each person who is the subject of a decision may make only one application to rescind or amend that decision.

Division

(4) A decision is rescinded or amended by the same Division that made it.

Leave decision

[5] On April 20, 2015, I dismissed the Applicant's application requesting leave to appeal. The Applicant had raised several grounds of appeal, but I was not satisfied that the appeal had a reasonable chance of success on any of the grounds. One of the grounds advanced by the Applicant was that the General Division had erred in refusing to admit updated medical records into the evidence. The Applicant did not identify these records. The General Division indicated, however, that the Applicant had declined to have them considered as part of the hearing file.

[6] In the application requesting leave to appeal, the Applicant sought to include a medical letter dated May 2, 2014 from the Applicant's family physician. I indicated that I was limited in considering any new evidence under subsection 58(1) of the DESDA.

[7] The Applicant also alleged in her leave application that the General Division had miscalculated the minimum qualifying period or had failed to apply proration; had failed to consider some of the evidence; had failed to assign the appropriate weight to the medical opinions; had erred in equating school attendance with capacity regularly of pursuing any substantially gainful occupation; and, finally, had erred in its application of *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

Time limit

[8] While I am alive to the Respondent's concerns that a separate application is required in respect of each decision being sought to rescind or amend, for the purposes of the matter before me, I will accept that the application was directed solely to the Appeal Division, or that there are two separate applications to rescind or amend.

[9] The leave decision was rendered on April 20, 2015. There is no indication from the Applicant as to when the leave decision had been communicated to her or her counsel, but otherwise it is deemed to have been communicated 10 days after the day on which it was mailed to the party, when sent by ordinary mail, pursuant to paragraph 19(1)(*a*) of the *Social Security Tribunal Regulations*. There is no evidence to the contrary that would warrant displacing this deeming provision.

[10] I see from my review of the hearing file that the Social Security Tribunal sent a letter dated April 20, 2015 to the parties notifying them of the leave decision. I therefore conclude that the leave decision had been communicated to the parties 10 days thereafter, on May 1, 2015.

[11] Subsection 66(2) of the DESDA stipulates that an application to rescind or amend a decision must be made within one year after the day on which a decision is communicated to an appellant. In this particular case, the Applicant would have been required to make an application to rescind or amend by no later than May 2, 2016, otherwise her application would be statute-barred by the effluxion of time. Clearly, the Applicant was beyond the period within which she was permitted to make an application to rescind or amend, when she filed one on December 20, 2016. On this basis alone, I would dismiss this application.

Requirements under subsection 66(1) of the DESDA

[12] However, even if the Applicant had been within the permitted timeframe, I would have dismissed the application. In this application to rescind or amend, the Applicant provided accompanying submissions, which referred to medical reports and records that had been "previously submitted". She identified these records as follows:

- physician's report dated November 25, 2006

- reports of Dr. McMurtry, dated June 28, 2007; October 3, 2008; November 21, 2008

- report dated August 8, 2007, of Dr. Shapiro, psychologist

- reports of Dr. George dated March 31, 2014; May 2, 2014; and October 14, 2016

- records of Dr. George, covering the period from May 2, 2014, to October 14, 2015

[13] The Applicant explains that the records meet the requirements under subsection 66(1) of the DESDA as "much of the medical evidence was dated after the deadline to submit to the file and the hearing date of April 1, 2014, and as such could not be available for the hearing" (*sic*).

[14] Paragraph 66(1)(*b*) of the DESDA requires that the new material fact could not have been discovered at the time of the hearing (or in this case, prior to the release of the leave decision) with the exercise of reasonable diligence. Other than the November 25, 2006 report, all of the reports between June 28, 2007 and November 21, 2008 were before the General Division and, indeed, were specifically referred to in its decision. They were also available for my review of the leave application. As such, I do not regard them as "new facts" for the purposes of section 66 of the DESDA.

[15] As for the physician's report dated November 25, 2006, there is no indication that the report could not have been discovered prior to April 20, 2015, when I rendered my leave decision. Similarly, the records and reports of Dr. George may have been prepared after the hearing before the General Division, but if the Applicant is requesting that I rescind or amend the leave decision, she is required to satisfy me as to why these records and reports could not have been discovered with the exercise of reasonable diligence, prior to the issuance of the leave decision. She has not provided me with any explanation as to why these medical records and reports could not have been discovered prior to April 20, 2015.

[16] If the Applicant is requesting that I rescind or amend the leave decision, she is also required to satisfy me that they would have been material to the leave determination. In other words, the Applicant would need to satisfy me, at the very least, that these medical records and reports are somehow relevant and material to the grounds of appeal set out in her application requesting leave to appeal. I do not see how these medical records and reports address the issues of whether the General Division had miscalculated the minimum qualifying period or had failed to determine whether proration applied; had failed to consider some of the evidence; had failed to assign the appropriate weight to the medical opinions; had erred in equating school attendance with capacity regularly of pursuing any substantially gainful occupation; and, finally, had erred in its application of *Inclima v. Canada (Attorney General)*, 2003 FCA 117. Even if these medical records and reports had met the discoverability test set out in paragraph 66(1)(*b*) of the DESDA, they would not have been material to my consideration on the application requesting leave to appeal.

[17] While there might be some suggestion that I should consider these medical records and reports in the context of whether they might be material to the decision of the General Division, this would be overstepping my jurisdiction. After all, subsection 66(4) of the DESDA stipulates that a decision is rescinded or amended by the same division that made it.

CONCLUSION

[18] The application to rescind or amend the decision of the Appeal Division rendered on April 20, 2015 is refused.

Janet Lew
Member, Appeal Division