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

Citation: *G. B. v. Minister of Employment and Social Development*, 2017 SSTADIS 465

Tribunal File Number: AD-17-92

BETWEEN:

G. B.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: September 6, 2017

Canada

REASONS AND DECISION

DECISION

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

INTRODUCTION

[2] On December 15, 2016, the Appeal Division of the Social Security Tribunal (Tribunal) dismissed an appeal of a decision of the Tribunal's General Division dated September 10, 2015.

[3] On January 20, 2017, the Applicant's counsel submitted an application to rescind or amend the decision of the Appeal Division.

THE LAW

[4] Section 66 of the *Department of Employment and Social Development Act* (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 (4) A decision is rescinded or amended by the same Division that made it.

[5] 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 appeal to the Appeal Division, the words "at the time of the hearing" must be read as "at the time the appeal

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.

[6] 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 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

[7] The Appeal Division must decide whether 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 dismissing the appeal from the General Division?

[8] I have decided that an oral hearing is unnecessary and the appeal will proceed on the basis of the documentary record for the following reasons:

(a) There are no gaps in the file or need for clarification;

(b) This form of hearing respects the requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

SUBMISSIONS

[9] In his application to rescind or amend, the Applicant requested that the Appeal Division reconsider its December 15, 2016 decision on the following bases:

(a) The Appeal Division's decision itself constituted a new fact;

---

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

(b) The Appeal Division abdicated its jurisdiction when it misapplied the law by incorrectly relying on *Tracey v. Canada*,[2] and thereby estopped any adjudication of the issues;

(c) The Appeal Division should have considered and weighed the facts in its decision, which was in complete contradiction of the decision granting leave to appeal.

[10] In written submissions dated March 6, 2017, the Respondent demanded a refusal of the Applicant's request to rescind or amend the Appeal Division's decision. It offered the following reasons:

(a) The Applicant did not disclose new material facts that could not have been discovered with reasonable diligence prior to the hearing before the Appeal Division;

(b) The Appeal Division's own decision to dismiss an appeal is not and may not constitute a new fact for the purposes of the paragraph 66(1)(*b*) of the DESDA in support of an application to rescind or amend an Appeal Divisions decision;

(c) The Applicant's present application is in effect an attempt to appeal the Appeal Division's decision to dismiss an appeal. The Appeal Division does not have jurisdiction to review its own decision. This falls under the authority of the Federal Court.

ANALYSIS

[11] The DESDA permits rescission or amendment of a Tribunal decision if there are new material facts, but I do not see how any of the Applicant's submissions meet that test. The argument that the Appeal Division's decision on the merits is itself a "new material fact" defies even the most liberal interpretation of paragraph 66(1)(*b*). The Applicant strongly disagrees with how the Appeal Division approached the standard of review, but I have no jurisdiction to

[2] *Tracey v. Canada (Attorney-General)*, 2015 FC 1300 (CanLII).

review an alleged error of law committed by a fellow member of the Appeal Division; that is a matter reserved for judicial review under section 68 of the DESDA.

[12] The Applicant also argues that the Appeal Division should have considered the evidence in its decision, but finding fact is not ordinarily part of its statutory mandate. The fact that the Appeal Division in this case did not assess the evidence is entirely in keeping with subsection 58(1) of the DESDA, which restricts the Appeal Division to specific grounds of appeal.

[13] It may be that the Applicant is operating under a misapprehension that bringing an application to rescind or amend to the Appeal Division will yield a generalized review of the evidence. In fact, paragraph 66(1)(*b*) provides for exceptional recourse 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. However, the Appeal Division adduces evidence and makes findings of fact only on the rarest of occasions, and this case was not one of them. Although the Applicant may believe that the Appeal Division's December 15, 2016 decision is rife with errors, his submissions manifest nothing that can be remedied under a section 66 application.

CONCLUSION

[14] I find that the Applicant has not presented new material facts that could not have been discovered with the exercise of reasonable diligence at the time of the Appeal Division's December 15, 2016 decision.

[15] The application is refused.

Member, Appeal Division