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

Citation: *K. G. v. Minister of Employment and Social Development*, 2018 SST 138

Tribunal File Number: AD-17-915

BETWEEN:

K. G.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: February 8, 2018

DECISION AND REASONS

DECISION

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

INTRODUCTION

[2] On June 20, 2017, the Appeal Division of the Social Security Tribunal issued a decision refusing leave to appeal the decision of the Tribunal's General Division dated November 22, 2016. On November 20, 2017, the Applicant, K. G., submitted an application to rescind or amend the Appeal Division's decision refusing leave to appeal.

[3] Since I have decided that an oral hearing is unnecessary, I will proceed by way of documentary review, because this format respects the requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

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 (4) A decision is rescinded or amended by the same Division that made it.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

[6] The test was refined in *Canada v. MacRae*,[1] a decision made in the context of the former subsection 84(2) of the *Canada Pension Plan* (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] I must decide whether the application to rescind or amend satisfies the test for new material facts set out in paragraph 66(1)(*b*) of the DESDA. Specifically, does the information presented by Mr. K. G. 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

[8] In his application to rescind or amend, Mr. K. G. referred to the file number (AD-16-1365) associated with the leave to appeal decision, which he said he received on June 20, 2017. He asked the Appeal Division to reverse its decision and grant him a CPP disability pension.

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

[9] Mr. K. G. implied there were new material facts to warrant the Appeal Division rescinding or amending its decision refusing leave to appeal. He included with his application to rescind or amend a report dated October 23, 2017, by Dr. Christos Soulios, a psychiatrist.

ANALYSIS

[10] Paragraph 66(1)(*b*) of the DESDA is particularly relevant to this application. It sets out the test for "new material facts" to rescind or amend a decision of the Social Security Tribunal that concerns the CPP.

[11] Mr. K. G. has submitted a medical report that was prepared four months after my leave to appeal decision was issued. The report itself could not have been discovered by the exercise of reasonable diligence, because it simply did not yet exist on June 20, 2017. Nevertheless, there are several reasons why Dr. Soulios's report cannot serve as a basis to rescind or amend my leave to appeal decision.

[12] First, the essential *content* of the letter was known and discoverable at the time of my leave to appeal decision. It does not appear that the letter disclosed any new information that was unavailable to me in June 2017, or, for that matter, to the General Division when it considered the merits of Mr. K. G.'s disability claim in November 2016. The letter contains details about Mr. K. G.'s mental health history that are documented elsewhere in his medical file, in particular, Dr. Brian Baker's January 2013 psychiatric report (GD2-82), which also diagnosed Mr. K. G. with major depression. Although there does not appear to have been any mention of Dr. Soulios in the record when I refused leave to appeal, Mr. K. G. had ample opportunity, in the months leading up to my decision, to solicit evidence from this particular treatment provider, had he wished to do so.

[13] Second, the content of the letter was not material. Dr. Soulios reported that he had treated Mr. K. G. in 2002–2004, long before the end of his minimum qualifying period on December 31, 2011. Moreover, Dr. Soulios's report is evidence that goes to the substance of Mr. K. G.'s claimed disability and, as such, is beyond my purview as a member of the Appeal Division, whose jurisdiction is constrained by its governing statute. I refused leave to appeal last year because none of the grounds advanced by Mr. K. G. fell into the specific categories set

out in subsection 58(1) of the DESDA; I doubt that the Soulios report, had I known about it in June 2017, would have had any effect on the outcome of my decision.

CONCLUSION

[14] I find that the "new facts" submitted by Mr. K. G. do not meet the test set out in paragraph 66(1)(*b*) of the DESDA. As a result, I see no reason to rescind or amend my leave to appeal decision of June 20, 2017.

Member, Appeal Division